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No. _____

In The
Supreme Court of the United States

ANTHONY RICCARDO,

Petitioner,

v.

LARRY RAUSCH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under *Farmer v. Brennan*, 511 U.S. 825 (1994), does a prison guard have knowledge sufficient to show deliberate indifference when a prisoner complains that his life is in danger from being in a cell with another inmate, or as the Seventh Circuit ruled is this insufficient especially in the absence of statistical evidence proving the reliability of prisoners' complaints?

2. Under *Farmer v. Brennan*, when is it appropriate for a court of appeals to overturn a jury's verdict that an officer was subjectively deliberately indifferent in failing to respond adequately to a serious threat to an inmate's safety?

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The opinion of the court of appeals reversing the judgment of the district court and the jury's verdict in favor of Petitioner is reported at 375 F.3d 521 (7th Cir. 2004) and is reprinted in the Appendix at pp. 1-29. The denial of *en banc* review and the dissents of four judges from this denial are found at Appendix pp. 22-29. The order and opinion of the district court upholding the jury's verdict and rejecting the defense motion for a judgment as a matter of law is unpublished and is reprinted in the Appendix at pp. 30-52. The judgment of the district court is found at Appendix p. 53. The opinion of the district court denying the defense motion to dismiss is unpublished and is reprinted in the Appendix at pp. 54-61.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its revised opinion and denied *en banc* review on July 12, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." United States Constitution, Amendment VIII.

STATEMENT OF THE CASE

Plaintiff Anthony Riccardo filed this lawsuit, in the United States District Court for the Southern District of Illinois, pursuant to 42 U.S.C. §1983, to recover for injuries he suffered from a physical and sexual assault by another inmate when he was a prisoner at Centralia Correctional Center. Riccardo sued Lt. Larry Rausch and alleged that Rausch had been deliberately indifferent to Riccardo's safety in violation of the Eighth Amendment to the Constitution and that this deliberate indifference caused the injuries Riccardo suffered. Ricardo alleged that Rausch ignored Riccardo's request to not be placed in a cell with Juan Garcia. Riccardo told Rausch that his life would be in danger if he were placed in a cell with Garcia, a member of a gang that had a "hit" on Riccardo.

Riccardo was sexually assaulted by Garcia, being forced to perform oral sex on Garcia. Additionally, Garcia physically abused Riccardo, including shaving Riccardo's head, and extorted money from Riccardo. Riccardo suffered very serious emotional and psychological injuries as a result.

Riccardo filed a grievance in the Illinois Department of Corrections on February 11, 1998. He filed an appeal to the Administrative Review Board on March 5, 1998. No response was received. Riccardo was paroled on March 5, 1998 and subsequently filed this lawsuit.

The District Court denied the defendant's motion to dismiss the plaintiff's complaint for the failure to exhaust administrative remedies pursuant to 42 U.S.C. §1997e. The District Court concluded that the grievance filed by Riccardo was sufficient to meet the exhaustion requirement.

A trial was then held and a jury found that Rausch had been deliberately indifferent to Riccardo's safety and that this caused Riccardo to suffer serious harm. The jury awarded Riccardo $1.5 million in damages.

The defendant filed a post-trial motion for a judgment as a matter of law and/or for a new trial pursuant to Federal Rules of Civil Procedure 50(b) and 59. Defendant Rausch argued that the evidence failed to show deliberate indifference on his part; that his actions were not the proximate cause of Riccardo's injuries; that he was entitled to qualified immunity; and that the damages award was grossly excessive. The District Court considered and expressly rejected each of these arguments and denied the defendant's motions. (App. at 30). The District Court then entered judgment for the plaintiff. (App. at 53).

Rausch then appealed to the United States Court of Appeals for the Seventh Circuit. On February 27, 2004, the United States Court of Appeals, in a 2-1 decision, affirmed the District Court's conclusion that there was adequate exhaustion of administrative remedies, but reversed the District Court's judgment. The court concluded that no reasonable jury could find "deliberate indifference" based on the record. Riccardo then petitioned for *en banc* review. On July 12, 2004, the United States Court of Appeals for the Seventh Circuit issued a revised opinion and denied *en banc* review. (App. at 1). Four judges dissented from the denial of *en banc* review. (App. at 22).

STATEMENT OF THE FACTS

In 1996, Anthony Riccardo was convicted of aggravated assault for stalking a former girl friend, and was sentenced to 39 months imprisonment, with credit for 152 days. Tr. I, at p. 58. While being held in Cook County jail, Riccardo was anally raped by his cellmate. Tr. I, at pp. 60-61. Upon his arrival at Centralia Correctional Center in November 1996, Riccardo voiced concerns about his safety and told a prison psychologist that he planned to seek protective custody. Tr. I, at p. 61. The prison psychologist did an evaluation and found that Riccardo's initial adjustment to his new environment was "slightly difficult." (Plaintiff's Exhibit 22 (12/2/96 Mental Health Evaluation)).

In April 1997, Riccardo was placed in disciplinary segregation for placing a towel over a bathroom window to prevent a female guard from being able to see him while he was using the bathroom. Tr. I, pp. 62-63. On May 21, 1997, Riccardo completed his disciplinary segregation and was sent to a cell in the receiving unit to await placement back in the general prison population. Tr. I, p. 63. While in the receiving unit, Riccardo's personal property was taken, presumably by his cellmate, who was a member of the Latin King gang. Tr. I, pp. 65-66. Riccardo objected to a guard that his property had been taken; this conversation was observed by other inmates. Tr. I, pp. 67-68. Riccardo then feared retaliation from members of the Latin King gang and Riccardo refused to return to his cell. Tr. I, pp. 67-68. Consistent with prison policy, Riccardo's request to not be housed with a purported enemy was honored and Riccardo was returned to segregation for refusing housing. Tr. I, pp. 25, 29, and 68. In accord with prison procedures, Riccardo was placed in "pre-disciplinary detention," so

that the prison could confirm whether there was a basis for Riccardo's concern about being housed with an enemy. Tr. I, pp. 67-68. On May 22, 1997, apparently because of a housing crunch in segregation, Riccardo was moved to a cell in an adjacent receiving building. Tr. III, pp. 74-77.

On May 28, 1997, Riccardo had a conversation with Juan Garcia. Garcia, a member of the Latin King gang, told Riccardo that he could help Riccardo get his property back from the gang members who had taken it. Tr. I, p. 70. Riccardo "didn't feel comfortable" after speaking with Garcia and Riccardo immediately spoke with Lt. Alemond, who as the first shift segregation lieutenant was responsible for housing during his shift. Tr. I, pp. 72-73. Riccardo explained to Lt. Alemond that Riccardo did not want to be housed with Garcia and that Riccardo feared for his life if placed in a cell with Garcia. Tr. I, pp. 72-73. Lt. Alemond said that he would "take care of it." Tr. I, p. 73.

At about 9:25 p.m. that night, Lt. Rausch, the second shift segregation lieutenant, brought Garcia to Riccardo's cell to be Riccardo's new cellmate. Tr. I, pp. 73-74. Riccardo panicked; he eventually got Rausch to go with him to a nearby day room and explained that he "fear[ed] for his life" because the Latin Kings had a "hit" on him; that Garcia was a Latin King; and that Lt. Alemond had agreed earlier in the day that Riccardo would not be celled with Garcia. Tr. I, pp. 74-75. Rausch replied that Riccardo had no right to refuse housing while in segregation and that there was no room to move him anywhere else. Tr. II, pp. 30-31.

Rausch then brought Riccardo and Garcia together and asked each, in turn, in front of the other, whether either had a problem with the other. Tr. I, p. 75. Garcia

stated that he did not have a problem with Riccardo; Riccardo, feeling like he was "on the hot seat," shook his head in the negative. Tr. I, p. 75. Riccardo testified at trial that Rausch had told him that he could not refuse housing, that there was no space to move him. Tr. II, pp. 30-31. Riccardo was already housed in the receiving unit as opposed to the segregation unit, something that occurs only when the segregation unit is already full. Tr. I at 24. Riccardo said that in light of this, he saw no point in objecting and since Garcia was much bigger than him, he did not want to complain and exacerbate the situation. Tr. I, p. 76. Rausch then placed Riccardo and Garcia in the same cell. Tr. I, p. 75.

Prison policy required that Rausch evaluate the suitability of housing the inmates together because the Placement Office was closed. Tr. I, p. 36. At trial, Lt. Rausch acknowledged that prison policy is that a prisoner in segregation is not placed in a cell with another inmate if the prisoner states that he does not want to be housed with that inmate. Tr. III, pp. 69-70. Rausch also testified that his usual practice would be to speak to the inmates separately, to determine if there was a problem, when one inmate indicated that he feared for his life. Tr. III, pp. 79-80. Rausch said that he had no recollection of the events which gave rise to this lawsuit.

The morning after Riccardo and Garcia were placed in the same cell, Riccardo filed two grievances, one regarding his stolen property and the other concerning health care. Tr. I, p. 70. Riccardo hoped that a psychologist or psychiatrist would ask to speak with him about the grievances, giving Riccardo the chance to speak away from Garcia. Tr. I, pp. 79-80. Later in the day, motivated by Garcia's promise to get the "hit" off of him and to gain the return of

some of his stolen property, Riccardo agreed to send money to Garcia's parents with instructions that the money be sent back to Garcia in prison. Tr. I, p. 77. Riccardo hoped that this action, designed to evade the prison rule against prisoners exchanging money, would attract the attention of the prison officials and give him a chance to complain about being housed with Garcia. Tr. I, pp. 77-80. Eventually, the money transfer did attract the attention of prison officials, but not until after Riccardo had been attacked by Garcia.

The next afternoon, May 30, Garcia told Riccardo that Riccardo needed a haircut and that Garcia would provide it. Tr. I, p. 80. Riccardo allowed Garcia to do this and it was poorly done, with Riccardo being nicked many times by the razor. Tr. I, p. 80. While Garcia was shaving Riccardo's head, Correctional Officer Watson came by and Garcia asked Riccardo to finish his own haircut. Tr. I, p. 81; Tr. III, p. 48. Officer Watson, seeing the bloody nicks on Riccardo's head, suggested that Riccardo go to the health care unit; Garcia, though, interrupted and said that Riccardo did not need to leave. Tr. I, p. 82. Riccardo mouthed, "Help me," to Watson, but Watson apparently did not see this. Tr. I, p. 82. After Watson left, Garcia slapped and punched Riccardo in the head. Tr. I, p. 82. Riccardo testified that he felt trapped and scared and he did not know what to do to extricate himself from the situation. Tr. II, pp. 36-37.

On the night of May 30, Garcia told Riccardo that he wanted to have anal sex with him. Tr. I, pp. 83-84. Riccardo refused and Garcia ejaculated on Riccardo's feet. Tr. I, pp. 83-84. Later that night, Garcia forced Riccardo to perform oral sex for approximately 15 minutes. Tr. I., p. 84; Tr. III, p. 43. Correctional Officer Watson came to their

cell to ask if they wanted some ice and, at that instant, Riccardo exited the cell, crouched in a nearby corner in a fetal position, and began crying. Tr. I, p. 84; Tr. III, pp. 43-44. Riccardo told Watson that Garcia had forced him to shave his head, beat him, and forced him to perform oral sex. Tr. III, pp. 43-44. Watson moved Riccardo to the Health Care Unit and told other prison officials. Tr. III, pp. 43-44.

Medical Progress Notes for May 30, 1997, indicate that Riccardo reported that Garcia had slapped and punched him, and that Garcia had forced him to have his head shaved and to perform oral sex. Plaintiff's Exhibit 23. An Illinois Department of Corrections Internal Affairs Investigation Report indicates that Garcia subsequently admitted to shaving Riccardo's head. Plaintiff's Exhibit 11. The investigation also found that plaintiff had been intimidated by Garcia into transferring funds, against prison regulations. Plaintiff's Exhibit 11. The report concluded: "Based on incident reports, voluntary statements, physical injuries, and polygraph exam results, Internal Affairs substantiates that Inmate Riccardo K50995 was intimidated into performing oral sex on Inmate Garcia N34024 on May 30, 1977." Plaintiff's Exhibit 11.

The nurse who initially saw Riccardo testified that he was severely distressed. Tr. I, p. 54. Riccardo was placed on a suicide watch from May 30 until June 2, when he was discharged from the Health Care Unit. Plaintiff's Exhibits 19-21. Health care officials noted possible Post Traumatic Stress Disorder (PTSD) based on Riccardo's feelings of stress and vulnerability, difficulties in sleeping, and flash backs.

Riccardo was transferred to Sheridan Correctional Center, where it was determined that he was not to be celled with another inmate. Plaintiff's Exhibit 23. Medical Progress Notes through June 18, 2000, reflect persistent complaints by Riccardo about anxiety and difficulty in sleeping. Plaintiff's Exhibit 23.

Several evaluations were done of Riccardo's mental condition, including by psychologist Sherry Kalicek who concluded that Riccardo suffered from Post Traumatic Stress Disorder. Plaintiff's Exhibit 22. Dr. Tony Fletcher, a neuropsychologist testified that Riccardo suffered from Post Traumatic Stress Disorder. Fletcher testified that after meeting with Riccardo for several hours, reviewing medical records, and conducting a battery of tests, he was convinced, to a reasonable degree of medical certainty, that Riccardo suffered from Post Traumatic Stress Disorder. Tr., pp. 54-55, 79-80, 83, and 109. Dr. Fletcher said that there was no evidence that Riccardo was exaggerating his psychological difficulties or malingering. Tr. II, pp. 73 and 80-82. Dr. Fletcher testified that Garcia's sexual assault, being the second such assault suffered by Riccardo, was the "straw that broke the camel's back." Tr. II, p. 100. Dr. Fletcher said that Post Traumatic Stress Disorder can continue for many years, with some continuing to exhibit symptoms for over 15 years, but that the condition can improve and remit. Tr. II, p. 104.

The jury returned a verdict in favor of Riccardo and awarded $1.5 million in damages. The district court denied Rausch's motion for a judgment as a matter of law and entered a judgment for Riccardo.

SUMMARY OF ARGUMENT

The Court of Appeals overturned the jury's verdict finding that Rausch's deliberate indifference was responsible for the sexual assault to Riccardo. The Seventh Circuit concluded that Riccardo informing Rausch of the threat was not sufficient. The court stressed that Riccardo had not presented statistical evidence showing that sexual assault is a significant problem in the prison where Riccardo was incarcerated or that prisoner's complaints of danger are usually accurate. (App. at 10). The court also emphasized that Riccardo complained to Rausch that his life would be in danger, not that he feared a sexual assault. (App. at 8).

This approach to defining "deliberate indifference" is in conflict with decisions of this Court and of many other Courts of Appeals. In a dissent from the denial of *en banc* review, Judge Ripple, joined by three other judges, made exactly this point:

> "Today, the court allows to stand the decision of a panel majority that imposes on prison inmates a new and impossibly high standard of proof for establishing deliberate indifference in prison condition cases. The panel majority strongly suggests that, in order to show deliberate indifference, a prisoner must not only identify with particularity the harm he fears but also bolster his own account with a special showing containing material such as statistical evidence of a 'strong correlation between prisoners' professions and actual violence.' Neither of these requirements find support in circuit or Supreme Court precedent. Consequently, the panel majority's imposition of these requirements not only does

> violence to our Eighth Amendment jurisprudence, but it also effectively amends, without any legislative mandate, the standard for judgment as a matter of law under Federal Rule of Civil Procedure 50 for cases brought by prisoners." App. at 22.

Judge Ripple's dissent from the denial of *en banc* review clearly sets forth why Supreme Court review in this case is necessary. Under this Court's decision in *Farmer v. Brennan,* 511 U.S. 825 (1994), a prisoner must demonstrate "deliberate indifference" in order to recover for injuries suffered while in prison. The prisoner must demonstrate both *objectively* that there was a serious risk of harm and *subjectively* that the officer knew and acted in disregard of this risk.

As this case illustrates, there is substantial uncertainty and a split among the Circuits concerning the legal standards to be applied in implementing this test. In the decade since *Farmer v. Brennan*, the Supreme Court has not returned to the issue and a divergent approach has developed among the lower courts. First, there is uncertainty and a split among the circuits as to what evidence is sufficient to show that an officer knew of a serious risk. For example, the Seventh Circuit expressly held that a complaint by a prisoner to a guard is not enough to constitute knowledge sufficient for a finding of deliberate indifference. *See* App. at 10 ("a prisoner's bare assertion is not enough to make the guard subjectively aware of a risk"). But other Circuits, in identical situations, have held that a prisoner's complaint to a prison guard of a threat to his or her life is sufficient to give the officer knowledge and to create a duty to act. *See, e.g., Flint v. Kentucky Dep't of Corrections,* 270 F.3d 340 (6th Cir. 2001).

In concluding that there was not objective evidence of deliberate indifference, the Seventh Circuit stressed the lack of statistical evidence concerning sexual assaults at the Centralia Prison and the reliability of prisoner complaints. App. at 10. But as Judge Ripple pointed out in his dissent from the denial of *en banc* review, no other Circuit ever has indicated that such evidence is needed and this creates an evidentiary burden that no prisoner could meet. The Seventh Circuit also emphasized that Riccardo complained of his life being in danger, not sexual assault, the injury he suffered. App. at 8. But several other Circuits have come to an opposite conclusion and said that a prisoner need not complain of the specific harm suffered. *See, e.g., Calderon-Ortiz v. Laboy-Alvarado*, 300 F.3d 60, 64 (1st Cir. 2002); *Curry v. Scott*, 249 F.3d 493, 507 (6th Cir. 2001); *Smith v. Brenoettsy*, 158 F.3d 908, 912 (5th Cir. 1998).

Second, there is substantial uncertainty and a split among the Circuits in applying the second prong of the *Farmer v. Brennan* test, specifically as to the appropriate role for the judge, and especially an appellate court, in reviewing a jury's finding of deliberate indifference. In *Farmer v. Brennan,* this Court stated that the determination of whether an officer is subjectively deliberately indifferent is inherently a factual question for the jury. 511 U.S. at 842.

In this case, the Seventh Circuit gave little weight to the jury's verdict finding deliberate indifference or the trial court's upholding that verdict in denying the defendant's motion for a judgment as a matter of law. The Seventh Circuit evaluated and weighed the evidence on its own in concluding that no reasonable jury could find deliberate indifference. This approach, however, conflicts

with that of many other Circuits which have expressly held that evidence like that presented in this case is sufficient to create a triable issue of fact which should be resolved by the jury. *See, e.g., Curry v. Scott,* 249 F.3d 493, 508 (6th Cir. 2001); *Giroux v. Somerset County*, 178 F.3d 28, 34 (1st Cir. 1999); *Hayes v. New York City Department of Corrections,* 84 F.3d 614, 621 (2d Cir. 1996).

The Seventh Circuit's decision in this case raises profoundly important questions of constitutional law affecting prisoners throughout the country. This Court should grant review to clarify the law concerning what evidence is sufficient to establish deliberate indifference and what is the appropriate role for an appellate court reviewing a jury's conclusion of deliberate indifference.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND TO CLARIFY AN IMPORTANT ISSUE OF LAW CONCERNING WHAT EVIDENCE A PRISONER MUST PRESENT TO DEMONSTRATE THAT A PRISON GUARD HAD SUFFICIENT KNOWLEDGE TO BE "DELIBERATELY INDIFFERENT" TO THE RISK OF VIOLENCE

In *Farmer v. Brennan,* 511 U.S. 825 (1994), this Court held that a prisoner's Eighth Amendment right to be free from cruel and unusual punishment is violated when a prisoner is sexually assaulted by another inmate and prison officials are "deliberately indifferent" to the prisoner's safety. The Court observed: "Prison conditions may be restrictive and even harsh, but gratuitously allowing the beating or rape of one prisoner by another serves no

legitimate penological objectiv[e], any more than it squares with evolving standards of decency. Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society." *Id.* at 833.

A prison official is "deliberately indifferent," if the official knows that an inmate faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. *Id.* at 847. In other words, the prisoner must satisfy both the objective (substantial risk of serious harm) and the subjective (knowing disregard) components of the test. *Id.* at 834. There is a conflict among the Circuits and uncertainty as to what is sufficient to meet both of these requirements under *Farmer v. Brennan*.

As Judge Williams noted in her dissent to the denial of *en banc* review: "With regard to the Eighth Amendment inquiry, the majority opinion highlights a major gap in the caselaw. Particularly, what is required to prove the objective prong of the deliberate indifference standard?" App. at 27.

The jury in this case found that Rausch's conduct was deliberately indifferent to Riccardo's safety and that this caused Riccardo's injuries. The district court after reviewing all the evidence came to the same conclusion and found that the objective requirement for deliberate indifference was met: "[T]aking the totality of the circumstances and information conveyed to Rausch, this Court finds, from an objective perspective, at the time Rausch made the decision to cell Garcia with plaintiff, there was a substantial risk of harm to plaintiff. The scenario defendant Rausch faced has 'DANGER – PROCEED WITH CAUTION' written all over it." App. at 45.

But the Seventh Circuit, in overturning the jury's finding of deliberate indifference, pointed to three major deficiencies in the evidence to meet this requirement. Each conflicts with the holdings of other Circuits in terms of what is required to show deliberate indifference.

First, the Seventh Circuit held that a complaint by a prisoner to a guard is not enough to constitute knowledge sufficient for a finding of deliberate indifference. The Court stated that "a prisoner's bare assertion is not enough to make the guard subjectively aware of a risk." App. at 10. The court said that the Rausch was not deliberately indifferent because Garcia was himself in segregation from the Latin Kings and that Garcia had not been disciplined for acts of violence in prison. App. at 9. The Seventh Circuit gave little or no weight to the factors that a reasonable jury could use to find the failure to respond to the complaint constituted deliberate indifference here. Riccardo was in segregation precisely because he had previously complained that the Latin Kings had a hit on him. Tr. I, pp. 25, 29, and 68. As Rausch admitted at trial, Illinois prison policy requires that inmates not be housed together, when one complains that the other is a threat to his or her safety. Tr. III, pp. 69-70, 79-80. Rausch could not evaluate whether Garcia posed a risk to Rausch; for example, he could know whether Garcia was in trouble with the Latin Kings and whether he might try to curry their favor by harming Riccardo.

Contrary to the Seventh Circuit's holding, other Circuits have ruled that the failure to respond to a prisoner's report of a threat to his safety is sufficient evidence to allow a conclusion of deliberate indifference. For example, in *Flint v. Kentucky Dep't of Corrections,* 270 F.3d 340 (6th Cir. 2001), the court held that a guard's failure to

respond adequately when a prisoner complains to a guard of likely violence from another inmate is sufficient to establish deliberate indifference. The court found that the defendant prison guard "disregarded the . . . articulated threat to [the attacked inmate's] health and safety. This scenario alone supports this Court's finding of deliberate indifference on the part of the Defendant." *Id.* at 354.

The underlying legal question here is one of great importance and one that constantly recurs. If a prisoner complains of likely violence from another inmate, is that enough to create knowledge sufficient for deliberate indifference? The Seventh Circuit says no because inmates might be making up the threat. App. at 9. Other Circuits have said that a complaint of potential violence is enough because inmates cannot protect themselves and because it is necessary to err on the side of protection rather than risk violence.

Second, the court stressed the absence of statistical evidence in the record to support Riccardo's claim of deliberate indifference. The court's approach here is so radical and unprecedented that it is worth quoting at length:

> "[Riccardo] might have attempted to demonstrate that there is a strong correlation between prisoners' professions of fear and actual violence. How many murders (or homosexual assaults) occur in Centralia (or the Illinois prison system) per hundred inmate-years of custody? How many violent events were preceded by requests for protection? How many requests for protection were dishonored, yet nothing untoward happened? Data along these lines would have enabled a jury (and the court) to evaluate actual risks even though Riccardo was unable to show that Rausch should have deemed Garcia to present an especial risk.

> If violence is common at Centralia, and inmates have good track records in identifying potential aggressors, then guards who do not have their heads in the sand must actually (that is, subjectively) understand the risk an inmate faces when a protest is disregarded. But if violence is rare, or if there is poor correlation between inmates' alarms and subsequent violence, then Riccardo's initial protest would not have provided Rausch with actual knowledge of an impending assault. The record does not contain any evidence along these lines. That leaves only Riccardo's say-so, and for reasons we have already given a prisoner's bare assertion is not enough to make the guard subjectively aware of a risk, if the objective indicators do not substantiate the inmate's assertion." App. at 10.

This emphasis on statistical evidence to prove deliberate indifference is in conflict with decisions of this Court and other Circuits and requires review by this Court to clarify the proof needed to show deliberate indifference. No decision of this Court, or any court in the country ever has emphasized such statistical evidence as proof of deliberate indifference. Such a standard would make it impossible for any prisoner to recover for deliberate indifference; such data does not exist and never can exist. No prison keeps data as to how many prison murders or rapes were preceded by reports of threats or how often prisoners reporting threats are not actually assaulted. No plaintiff ever could produce such data. The Seventh Circuit's requirement for such data would excuse prisons ignoring threats to inmates in all cases because they would know that no prisoner ever would be able to produce the evidence required concerning the frequency and accuracy of reports of threats by inmates.

Indeed, such a standard directly conflicts with *Farmer v. Brennan* and many decisions of other Circuit's holding that it is sufficient that prison officials actually knew that an inmate faced a serious harm and disregarded the risk by failing to take reasonable steps to avoid it. Contrary to the Seventh Circuit's holding, other circuits have found that statistics, such as the number of complaints filed, are irrelevant to determining whether there has been deliberate indifference. *See, e.g., Smith v. Brenoettsy*, 158 F.3d 908, 912 (5th Cir. 1998). Indeed, other circuits have ruled that a "prison official's knowledge of a substantial risk is a question of fact and can, of course, be proved by circumstantial evidence." *Hamilton v. Leavy*, 117 F.3d 742, 747 (3rd Cir. 1997); *see also Spruce v. Sargent*, 149 F.3d 783, 786 (8th Cir. 1998) ("The question of whether the official knew of the risk is subject to demonstration, like any other question of fact, by inference from circumstantial evidence.") This is the antithesis of the Seventh Circuit's emphasis on statistical evidence in this case.

Third, the Seventh Circuit stressed that there was not a showing of deliberate indifference because Riccardo complained to Rausch of a "hit" on his life, but that is not the harm which occurred; Riccardo was sexually assaulted and not killed. The Seventh Circuit stated: "Thus the risk that Riccardo professed to fear (a "hit") did not come to pass. Even under the law of negligence, this is an important distinction. If a school district entrusts a bus to a driver with a bad drinking record, and the tipsy driver runs the bus off the road while speeding, the school district is liable; but if instead there is an accident for which the driver is not at fault (a tree falls on bus), or the driver collapses of a heart attack while on the road, the district is not liable, because that was not the type of risk created or

increased by the negligent conduct even though hiring this particular driver was in the causal chain. The risk from which Riccardo sought protection was not realized; for all this record shows, the (objectively evaluated) risk to Riccardo of sharing a cell with Garcia was no greater than the risk of sharing a cell with any other prisoner." App. at 8.

But several other Circuits have come to exactly the opposite conclusion and have held that the prisoner need not have complained of the specific harm in order to show deliberate indifference. For example, in *Smith v. Brenoettsy*, 158 F.3d at 912 (emphasis added), the Fifth Circuit stated: "While a prisoner normally must complain about a specific threat to a supervisory official in order to give actual notice to that official, *we have never held that a supervisory official be warned of the precise act that the subordinate official subsequently commits.*" Likewise, the First Circuit has held that "knowledge may be averred generally" and that a prisoner need not have complained of the specific harm that occurred. *Calderon-Ortiz v. Laboy-Alvarado*, 300 F.3d 60, 64 (1st Cir. 2002). Similarly, in another case involving a prisoner injured by an assault by another inmate, the Sixth Circuit concluded that "actual knowledge does not require that a prison official know . . . that a particular prisoner would be harmed in a certain way." *Curry v. Scott*, 249 F.3d 493, 507 (6th Cir. 2001).

Simply put, there is a split among the Circuits about a legal issue that constantly arises in courts throughout the country: What is sufficient evidence to demonstrate that a prison guard had sufficient knowledge of a threat to constitute deliberate indifference? Is a complaint by an inmate sufficient? The Seventh Circuit says no, but other

Circuits have come to an opposite conclusion. Is statistical evidence important in order to establish deliberate indifference? The Seventh Circuit says yes, but this creates a new and unprecedented requirement, which would mean that no prisoner ever will succeed in showing deliberate indifference because the data described by the Seventh Circuit does not, and never can, exist. Must the inmate complain of the specific harm which occurred? The Seventh Circuit says yes, but several other Circuits have come to an opposite conclusion. It is important that this Court grant review to resolve this conflict among the Circuits and clarify what evidence a prisoner must present to demonstrate "deliberate indifference" to a risk of violence.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND TO CLARIFY AN IMPORTANT ISSUE OF LAW CONCERNING WHEN IT IS APPROPRIATE FOR A COURT OF APPEALS TO OVERTURN A JURY'S VERDICT THAT A PRISON GUARD WAS SUBJECTIVELY INDIFFERENT TO A PRISONER'S SAFETY AND THUS IS LIABLE FOR THE INJURIES SUFFERED

In *Farmer v. Brennan*, this Court emphasized that the question of whether a prison guard fails to respond adequately to a known risk, the subjective prong of the deliberate indifference inquiry, is inherently a factual question. The Court stated: "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial

risk from the very fact that the risk was obvious." 511 U.S. at 842.

The district court in this case, after hearing all the evidence, found that the jury verdict finding deliberate indifference was supported by the record. In denying the defendant's post-trial motion for a judgment as a matter of law, the court stated:

> "However, in this case, there is ample evidence from which to conclude that Rausch's attempt to ascertain the seriousness of the threat was mere pretense, and that because he did not want to go to the extra effort to find different accommodations for Garcia, he recklessly disregarded what he knew to be a dangerous situation. That decision to essentially disregard the threat is where liability lies. A jury could have reasonably inferred that Rausch crossed the line from gross negligence to deliberate indifference based on the ludicrousness of 'asking' each inmate if he had a problem with the other. Credibility had to have been the key to the jury's analysis, thus Court cannot interject its own credibility determinations; and if it could, having observed both parties' testimony, it may very well have reached the same conclusion as the jury." App. at 46.

The Seventh Circuit, however, overturned the district court and the jury verdict concluding: "No reasonable jury could have found, in light of Riccardo's denial of a 'problem' with Garcia and Rausch's decision to act accordingly, that Rausch subjectively appreciated that his action would expose Riccardo to a substantial risk of serious harm." App. at 9. But as Judge Williams notes in her dissent from the denial of *en banc* review: "The jury heard evidence that Rausch put the two men in front of each other

to determine whether a problem existed. It is this act, which the majority uses to exonerate Rausch from liability. However, it is this very act which evinces Rausch's deliberate indifference as found by the jury and reiterated by the district court." App. at 29.

In other words, the Court of Appeals overturned the jury verdict and the district court by engaging in its own evaluation of the credibility of the witnesses and by reweighing the evidence in the case. The Court of Appeals approach directly conflicts with that followed in other Circuits and raises a crucial question for this Court to resolve: What is the appropriate role of the appellate court in reviewing a jury's determination that the second, subjective prong of the *Farmer v. Brennan* is met? For example, contrary to the standard used by the Seventh Circuit in this case, the United States Court of Appeals for the Tenth Circuit has said that overturning a jury verdict "is appropriate only when the evidence and all the inferences to be drawn therefrom are so patent that minds of reasonable men could not differ from the conclusions to be drawn therefrom. . . . [A] directed verdict or judgment n.o.v. may not be granted unless the evidence points one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made." *The Travelers Insurance Co. v. Mueller Co.*, 493 F.2d 972, 976 (10th Cir. 1972). *See also Woods v. Lecureux*, 110 F.3d 1215 (6th Cir. 1997) (whether prison guard was subjectively indifferent is a question of fact for the jury and evidence is not to be reweighed by judges); *Stubbs v. Dudley*, 849 F.2d 83, 85 (2nd Cir. 1988) (the jury's verdict of a prison guard's deliberate indifference can be overturned only if "there can be but one conclusion

as to the verdict that reasonable persons could have reached.")

Likewise, many other Circuits in cases involving deliberate indifference by prison guards have stressed the need for great deference to the jury's fact-finding. In *Giroux v. Somerset County*, 178 F.3d 28, 34 (1st Cir. 1999), the court concluded that a reasonable jury could find deliberate indifference when a guard did not respond to a report of a threat by one inmate against another. Similarly, in *Hayes v. New York City Department of Corrections,* 84 F.3d 614, 621 (2d Cir. 1996), the court concluded that in a case where a prisoner was attacked by another inmate "the reasonableness of the defendant's actions . . . is suitable for resolution by a jury." In *Curry v. Scott,* 249 F.3d 493, 508 (6th Cir. 2001), the court said that to establish deliberate indifference the plaintiff only "need show that an issue of material fact exists as to whether the supervisory defendants were aware that Scott posed a risk of substantial injury to the inmates and were deliberately indifferent to that risk."

The approach taken by the Seventh Circuit in this case directly conflicts with that followed by the other Circuits. Whereas the other Circuits profess a need for great deference to a jury's finding that an officer is subjectively deliberately indifferent, the Seventh Circuit reweighed the evidence to come to its own conclusion. This case presents an issue that constantly recurs in prison litigation: what is the appropriate role for the court in examining a jury's verdict finding deliberate indifference?

CONCLUSION

Judge Ripple, in his dissent from the denial of *en banc* review, concisely explained the stakes of the Seventh Circuit's approach to defining deliberate indifference and of engaging in appellate review of jury determinations: "The panel majority not only deprives Mr. Riccardo of his right to a jury trial, it also takes a very significant step in depriving individuals incarcerated in this circuit of a realistic opportunity to meet their burden of proof in these cases." App. at 27. The Seventh Circuit's opinion conflicts with that of other Circuits in terms of how both the objective and subjective aspects of *Farmer v. Brennan*'s deliberate indifference test are to be defined and implemented. This is an issue that affects lawsuits by prisoners, and ultimately the treatment of prisoners, everywhere in the country. This Court should grant review to resolve the conflict in the Circuits and clarify this important area of the law.

Respectfully submitted,

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375 F.3d 521

United States Court of Appeals,
Seventh Circuit.

Anthony **RICCARDO**, Plaintiff-Appellee,
v.
Larry RAUSCH, Defendant-Appellant.

No. 02-1961.

Argued Oct. 22, 2003.
Decided Feb. 27, 2004.
Amended July 12, 2004.

Erwin Chemerinsky (argued), University of Southern California Law Center, Los Angeles, CA, for Plaintiff-Appellee.

Mary E. Welsh (argued), Office of the Attorney General, Civil Appeals Div., Chicago, IL, for Defendant-Appellant.

Before FLAUM, Chief Judge, and EASTERBROOK and WILLIAMS, Circuit Judges.

EASTERBROOK, Circuit Judge.

Anthony Riccardo, an inmate of the Centralia Correctional Center in Illinois, needed a new cellmate after his former cellmate complained about being housed with him. Normally that pairing would have been made by Centralia's placement office, but when the evening of May 28, 1997, arrived and some inmates remained unassigned after the regular placement officers had left, the task fell to Lt. Larry Rausch, who was serving the second shift. Rausch matched Riccardo with Juan Garcia, a pairing that should have lasted only until the placement officers on the day shift could review matters. Two days later Garcia

sexually assaulted Riccardo, who sued Rausch under 42 U.S.C. § 1983. A jury concluded that Rausch had subjected Riccardo to cruel and unusual punishment and awarded $1.5 million in compensatory damages. The district court entered judgment on this verdict, and Rausch appeals.

His lead-off argument is that Riccardo failed to use his administrative remedies. If so, then 42 U.S.C. § 1997e(a), part of the Prison Litigation Reform Act, forecloses this suit even though Riccardo challenges a discrete incident and wants a form of relief – money damages – that the administrative process in Illinois does not provide. See *Porter v. Nussle,* 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002); *Booth v. Churner,* 532 U.S. 731, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001). Riccardo did file an administrative grievance, but Rausch contends it was too late (in February 1998, while Illinois sets a limit of six months) and asked the state to prosecute Garcia rather than do anything about Rausch and the classification system.

Prisoners must follow state rules about the time and content of grievances. See *Pozo v. McCaughtry,* 286 F.3d 1022 (7th Cir.2002); *Strong v. David,* 297 F.3d 646 (7th Cir.2002). Failure to do this means failure to use (and thus to exhaust) available remedies. Yet the state's administrative apparatus did not reject Riccardo's grievance as untimely; it accepted and denied the grievance on the merits. At the time of these events, Illinois permitted a filing after six months when the prisoner had good cause, see 20 Ill. Admin. Code § 504.810 (1997). The official handling the grievance must have found good cause; anyway, we held in *Pozo* that, when a state treats a filing as timely and resolves it on the merits, the federal judiciary will not second-guess that action, for the grievance has

served its function of alerting the state and inviting corrective action. 286 F.3d at 1025.

As for the content of this grievance; true enough, its main objective was to have Garcia prosecuted. (Riccardo deemed inadequate Garcia's punishment within the prison system.) But it also at least hinted at problems in prison administration. Riccardo wrote: "[T]he administration don't [sic] do there [sic] job. [A sexual assault] should've never [sic] happen again." This language is ambiguous. There are two principal ways to reduce the number of sexual assaults in prison: better steps *ex ante* to separate potential aggressors from potential victims; and harsher penalties *ex post* in order to deter future assaults. Riccardo did not distinguish between the two, and a prison administration receiving such a grievance should have considered both. Illinois has not adopted any rule governing the level of detail required of prisoners' grievances. "When the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in a notice-pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming." *Strong,* 297 F.3d at 650. The document that Riccardo filed is at the border of intelligibility; it is hard to imagine much less that a prisoner could do and still alert the prison; yet this grievance *did* complain that Garcia had committed a rape and that "the administration don't do there [sic] job." A generous construction of this grievance would have induced the prison to consider the possibility that the guards could have prevented this assault. So we conclude that Riccardo exhausted the administrative process. If Illinois wants grievances to be more detailed, it

must adopt appropriate regulations and inform prisoners what is required of them. Riccardo is entitled to a decision on the merits of his constitutional claim.

Because Riccardo prevailed at trial, we recap the facts in the light most favorable to his position. Riccardo was anally raped by his cellmate at Cook County Jail, shortly after his conviction for aggravated assault. When he arrived at Centralia Correctional Center in November 1996, he told the prison psychologist that he did not feel safe. After a stint in segregation for violating prison rules, Riccardo declined to return to the general population. He told guards that a cellmate in the segregation unit had stolen some of his property and objected to spending another day with that cellmate. He believed that the responsible inmate belonged to the Latin Kings gang and that the Latin Kings may have been preparing to kill him – though he did not say why he believed this. But Centralia allows inmates to veto housing with persons they declare to be enemies, so the prison found Riccardo a new cellmate. When, after a few days, that cellmate objected to spending more time with Riccardo, another pairing was required. (The segregation unit was too crowded to permit Riccardo a cell of his own.)

During the afternoon of May 28, Garcia had offered to help Riccardo retrieve his stolen property. Riccardo took this as an ill omen rather than as a genuine offer of assistance and told Lt. Alemond that he feared for his life if celled with Garcia. Although Alemond said that he would "take care of it," he did nothing – he did not either find a cellmate for Riccardo or alert Lt. Rausch, Alemond's replacement on the next shift. About 9:30 that evening, Rausch brought Garcia to Riccardo's cell and told him that Garcia was his new cellmate. Before the cells were locked

for the night, Riccardo sought out Rausch in private and told him that he believed that the Latin Kings had a "hit" out on him, and that he feared for his life if celled with Garcia. Rausch replied that there was no place else to put Garcia (or Riccardo) that evening, and that he could not refuse housing while in segregation. Rausch then brought Riccardo and Garcia back together and asked each, in turn, if he had a problem with the other. Riccardo shook his head in the negative. Rausch took that as agreement to the assignment. That was Riccardo's last contact with Rausch. As we have mentioned, nothing untoward happened that evening or the next, but during the evening of May 30 Garcia compelled Riccardo to perform oral sex. The record does not suggest that this assault had any connection to the Latin Kings. During the time between assignment and assault, Riccardo did not ask for a different cellmate (though he did file two grievances on May 29 about other matters). Circumstances brought out at trial suggest that other guards should have recognized on May 30 that problems had developed between Riccardo and Garcia; their failure to intervene may be culpable but cannot be attributed to Rausch, whose liability depends exclusively on his actions the evening of May 28.

Rausch did not assault Riccardo and is not vicariously liable for Garcia's crime. Like other guards, however, Rausch was required to refrain from placing Riccardo in harm's way gratuitously. The qualification "gratuitously" is important, because prisons are dangerous places. Inmates get there by violent acts, and many prisoners have a propensity to commit more. Guards cannot turn away persons committed by the courts; nor do individual guards have any control over crowding and other systemic circumstances. All that can be expected is that guards act

responsibly under the circumstances that confront them. See *McGill v. Duckworth,* 944 F.2d 344 (7th Cir.1991). A guard may be responsible without being credulous. Some prisoners are manipulative and cry "wolf" in an effort to have a cell to themselves or choose a favored cellmate. Other prisoners perceive specters in every shadow, even though their fears are unsupported. (There is, for example, no reason to think that the Latin Kings ever had it in for Riccardo. He did not belong to a rival gang, and there is no history of violent or overtly hostile encounters between Riccardo and any gang member.) Guards therefore must discriminate between serious risks of harm and feigned or imagined ones, which is not an easy task given the brief time and scant information available to make each of the many decisions that fill every day's work.

The eighth amendment does not demand that guards perform this task flawlessly. It does not even hold them to the negligence standard. Liability is possible, instead, only when a guard is deliberately indifferent to a substantial risk of serious harm. See *Helling v. McKinney,* 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993); *Wilson v. Seiter,* 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991); *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). "Deliberate indifference" means subjective awareness. See *Farmer v. Brennan,* 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). It is not enough, the Court held in *Farmer,* that the guard *ought* to have recognized the risk. Instead, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837, 114 S.Ct. 1970.

Rausch contends that Riccardo did not face a "substantial risk of serious harm" from Garcia on the evening

of May 28, 1997; that, if such a risk was present, Rausch did not appreciate its existence; and that at all events he is entitled to qualified immunity because reasonable officers would not necessarily have understood that the law clearly required Riccardo and Garcia to be in separate cells. The first two matters (the objective and subjective components of the eighth amendment) are for the jury in the first instance, with appellate review limited to the question whether any reasonable juror could have found that the requisite level of risk existed, and that Rausch knew it. Immunity, however, is a matter of law for the court, to be decided without deference to the jury's resolution – and preferably before the case goes to the jury. See *Saucier v. Katz,* 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). The district court brushed aside Rausch's invocation of immunity, writing that a guard cannot benefit from immunity if the action taken was not a reasonable response to a risk actually foreseen. That approach, which merges immunity and the merits, is incompatible with *Saucier* and its predecessors. See 533 U.S. at 203-06, 121 S.Ct. 2151. Immunity protects officials who act at the "hazy border" (*id.* at 206, 121 S.Ct. 2151) between the lawful and the forbidden. That Rausch may have overstepped the line does not mean that every reasonable officer would have been bound to know that Rausch acted improperly. We need not pursue the immunity defense, however, because *Saucier* calls on appellate courts to address the merits first, see *id.* at 201, 121 S.Ct. 2151, and Rausch is entitled to prevail outright: no reasonable juror could have concluded, on this record, that Rausch actually recognized that placing Garcia and Riccardo together exposed Riccardo to substantial risk.

Now it might seem that Rausch *had* to appreciate the risk, because (a) Riccardo claimed to fear for his life if celled with any member of the Latin Kings, and (b) Garcia in fact harmed Riccardo. One problem with relying on how things turned out to show knowledge of risk beforehand is that Garcia did *not* act for the Latin Kings; he told Riccardo that he was fulfilling a personal fantasy, and Riccardo believed this explanation. Thus the risk that Riccardo professed to fear (a "hit") did not come to pass. Even under the law of negligence, this is an important distinction. If a school district entrusts a bus to a driver with a bad drinking record, and the tipsy driver runs the bus off the road while speeding, the school district is liable; but if instead there is an accident for which the driver is not at fault (a tree falls on bus), or the driver collapses of a heart attack while on the road, the district is not liable, because that was not the type of risk created or increased by the negligent conduct even though hiring this particular driver was in the causal chain. See, e.g., *Berry v. Sugar Notch Borough,* 191 Pa. 345, 43 A. 240 (1899). The risk from which Riccardo sought protection was not realized; for all this record shows, the (objectively evaluated) risk to Riccardo of sharing a cell with Garcia was no greater than the risk of sharing a cell with any other prisoner.

As for Rausch's subjective assessment: though Riccardo *initially* asserted mortal fear, when later asked whether he "had a problem" with Garcia he shook his head to give a negative answer. Rausch then had to decide which statement to believe. Riccardo argues, and the jury evidently concluded, that Rausch should have believed the first statement, communicated in private, rather than the second, communicated in Garcia's presence. A rational jury

could have thought that guards should give priority to statements made in private. (Rausch testified that, if Riccardo had claimed to "have a problem" with Garcia, they would have been separated; but Riccardo might have feared the consequences in a later encounter in the prison's general population.) Still, what Rausch should have believed is not the right question; we need to know what he *did* believe. No reasonable jury could have found, in light of Riccardo's denial of "a problem" with Garcia and Rausch's decision to act accordingly, that Rausch subjectively appreciated that his action would expose Riccardo to a substantial risk of serious harm.

As we have already explained, prisoners may object to potential cellmates in an effort to manipulate assignments, or out of ignorance; thus although a protest may demonstrate risk it does not necessarily do so. The Constitution does not oblige guards to believe whatever inmates say. How does a reasonable guard separate fact from fiction? Rausch knew when making the assignment at least two things beyond Riccardo's contradictory assertions. First, Rausch knew that Garcia was himself in segregation for protection *from* the Latin Kings (or at least a subset of them). Perhaps Garcia was manipulating the system himself, falsely asserting to fear the Latin Kings so that he could serve as their assassin; but at least at first cut Garcia could not be deemed a gang enforcer (and, as we learned *ex post,* his attack on Riccardo was neither a "hit" nor gang related). Second, Rausch knew that Garcia had a clean record in prison. He had not been disciplined for acts of violence (let alone for sexual assault). That makes it reasonable for Rausch to have deemed Riccardo's initial protestation unjustified. It is not as if Rausch housed Riccardo with a known sexual predator.

Lest this observation be thought to leave prisoners without protection from assaults by others with "clean" records, we add that there may be other ways to show both an objectively serious risk and the guards' knowledge of that risk. For example, Riccardo might have attempted to demonstrate that there is a strong correlation between prisoners' professions of fear and actual violence. How many murders (or homosexual assaults) occur in Centralia (or the Illinois prison system) per hundred inmate-years of custody? How many violent events were preceded by requests for protection? How many requests for protection were dishonored, yet nothing untoward happened? Data along these lines would have enabled a jury (and the court) to evaluate actual risks even though Riccardo was unable to show that Rausch should have deemed Garcia to present an especial risk. If violence is common at Centralia, and inmates have good track records in identifying potential aggressors, then guards who do not have their heads in the sand must actually (that is, subjectively) understand the risk an inmate faces when a protest is disregarded. But if violence is rare, or if there is poor correlation between inmates' alarums and subsequent violence, then Riccardo's initial protest would not have provided Rausch with actual knowledge of an impending assault. The record does not contain any evidence along these lines. That leaves only Riccardo's say-so, and for reasons we have already given a prisoner's bare assertion is not enough to make the guard subjectively aware of a risk, if the objective indicators do not substantiate the inmate's assertion.

Rausch also was entitled to believe that his assignment of Garcia and Riccardo to share a cell would last for one night only. During the next day shift the placement

office, armed with better information, was supposed to make a fresh evaluation and, if appropriate, a new assignment. Apparently that did not happen; the record does not show why. (Maybe it did happen and the staff approved Rausch's action.) If Rausch *knew* that the staff charged with this responsibility routinely failed to carry it out, then he might have been obliged to take additional precautions (such as separate interviews of Garcia and Riccardo to probe these issues more deeply) before making an assignment. Rausch himself testified that separate interviews would have been better practice, but the Constitution does not enforce all "better practices"; this is one respect in which the eighth amendment standard differs from the negligence standard. But Riccardo does not contend, and the record does not demonstrate, that disregard of the classification system at Centralia was so common that Rausch was bound to know that his assignment would last indefinitely. Nor was Rausch bound to foresee that, if Riccardo was in genuine fear, he would neglect to complain the next day, when he readily could have done so. (Recall that Riccardo filed two grievances on May 29 about other subjects.) Riccardo testified that he was too terrified to protest and was put off by Rausch's assertion that prisoners in segregation can't refuse assignments; yet grievances are confidential (so Garcia would not have known), and prisoners often appeal over the head of a guard who has told them that something can't or won't be done. Riccardo had already objected to, and obtained the removal of, at least one cellmate assigned to him in segregation. At all events, the question on the table is what Rausch knew (or deliberately avoided learning) on May 28; and there is no evidence that Rausch subjectively believed that Riccardo would fail to use his opportunity to seek further review the next day.

Illinois is free, if it wishes, to give prisoners veto power over the identity of their cellmates. But the eighth amendment does not do so of its own force, and prisoners cannot use the Constitution to achieve this control indirectly by making unsubstantiated assertions. The constitutional question is not what Riccardo (initially) said, but what Rausch actually believed. Some prisoners are manipulative, some are mistaken, and some are not only honest but also accurate. The Constitution does not oblige guards to assume (on pain of absolute liability if an assault later occurs) that all prisoners are in the third category; *Farmer* articulates a different, and more demanding, standard, preserving room for both independent judgment and honest mistake on the guards' part. This record does not permit a reasonable jury to find that Rausch knew or deliberately disregarded the fact that his actions subjected Riccardo to a substantial risk off serious harm, so the judgment is

REVERSED.

WILLIAMS, Circuit Judge, dissenting.

While I agree that Anthony Riccardo did in fact exhaust his administrative remedies, I disagree with the majority's decision to overturn the judgment in this action as a reasonable jury had ample evidence to find that Lieutenant Larry Rausch was deliberately indifferent to the substantial risk of harm Riccardo faced by being celled with Juan Garcia. Therefore, I respectfully dissent.

On May 30, 1997, while celled with Juan Garcia, a known member of the Latin Kings, Riccardo's head was forcibly shaven by Garcia such that Riccardo was "bleeding pretty bad." Tr. I at 81-82. Garcia then attempted to sodomize Riccardo; however, he was able to resist. Tr. II at

50. After Riccardo resisted, Garcia ejaculated on Riccardo's feet. Tr. I at 83-84. Riccardo was then forced to perform oral sex on Garcia for 15 to 20 minutes. *Id.* The assault ended when an officer walked by the cell. As the majority notes, the events which give rise to Lt. Rausch's liability are limited to the happenings on the evening of May 28, 1997, when Lt. Rausch replaced Lt. Alemond[1] as the lieutenant in charge of the segregation and receiving units at Centralia prison.[2]

On appeal, Lt. Rausch contends, and the majority agrees, that the evidence introduced at trial was legally insufficient to support a finding of liability under the Eighth Amendment. To sustain overturning a jury verdict, the record must demonstrate no "legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party." *Payne v. Milwaukee County,* 146 F.3d 430, 432 (7th Cir.1998). While undertaking this assessment, we analyze the "the totality of the evidence," *Sheehan v. Donlen Corp.,* 173 F.3d 1039, 1043 (7th Cir.1999), and are obliged to leave the judgment undisturbed unless the moving party can show that "no rational jury could have brought in a verdict against him." *EEOC v. G-K-G, Inc.,* 39 F.3d 740, 745 (7th Cir.1994). It is not within the province of the appellate courts to "reweigh the evidence." *Knox v. State of Indiana,* 93 F.3d 1327, 1332 (7th Cir.1996). Lastly, and most importantly, all reasonable inferences must be

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[1] Riccardo previously complained to Lt. Alemond that he feared being celled with Garcia because he was a Latin King, however, the record reveals that this previous complaint was not voiced to Lt. Rausch and therefore may not support a finding of liability against him.

[2] Lt. Rausch testified that he had no recollection of the events which transpired on May 28. Tr. III at 68. Thus, the jury was left with Riccardo's testimony concerning the events of that evening.

analyzed in the light most favorable to Riccardo as the non-moving party. *Sheehan,* 173 F.3d at 1044.

In *Farmer v. Brennan,* 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) the Court bifurcated the standard for Eighth Amendment liability into an objective element and a subjective element. First, the potential harm to the inmate must be objectively serious. *Id.* (citing *Wilson v. Seiter,* 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991)). Second, under the subjective prong, the prison official must "deliberately disregard" this potential harm by being "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [also] draw[ing] the inference." *Id.* at 838, 114 S.Ct. 1970.

The second inquiry is a question of fact, sustainable through circumstantial evidence, *id.* at 842, 114 S.Ct. 1970, mandating an "inquiry into a prison official's state of mind." *Id.* at 837, 114 S.Ct. 1970 (quoting *Wilson,* 501 U.S. at 299, 111 S.Ct. 2321). "A prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." *McGill v. Duckworth,* 944 F.2d 344, 349 (7th Cir.1991) (reasoning that the scienter requirement is satisfied when a prison guard, "[s]uspect[s] something is true but shut[s] [his] eyes for fear of what [he] will learn" or "[goes] out of [his] way to avoid acquiring unwelcomed knowledge").

The Supreme Court also cautioned that an "Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of

serious harm." *Farmer,* 511 U.S. at 842, 114 S.Ct. 1970. Likewise, a claimant need not prove that a prison official was aware of the specific type of harm which befell the prisoner, only that the prison official was aware that a substantial risk of some type of danger existed. *See Haley v. Gross,* 86 F.3d 630, 643 n. 33 (7th Cir.1996) (applying *Farmer,* 511 U.S. at 843, 114 S.Ct. 1970) (upholding jury verdict for $1.65 million based on a finding that prison guards were deliberately indifferent by failing to respond to a prisoner's repeated request to be removed from cell when his cellmate set fire to cell causing the cellmate's death and plaintiff's severe burns). Thus, it was Riccardo's burden to show that Lt. Rausch actually knew that there was a substantial risk that Garcia would harm Riccardo. *Id.* However, Lt. Rausch would be shielded from liability if no objectively serious risk existed, he was unaware of the impending risk, *McGill,* 944 F.2d at 349, or he took reasonable steps to abate it, whether successful or not, *Farmer,* 511 U.S. at 844, 114 S.Ct. 1970.

Admittedly, there is evidence in the record to support a finding that Garcia did not objectively pose a substantial threat to Riccardo – namely, the fact that Garcia was also placed in segregation for "enemy protection," allegedly from the Latin Kings, and that Garcia had no history of sexual assault. However, that is not the standard by which this case should be reviewed. The standard is whether there exists a legally sufficient evidentiary basis for a reasonable jury to find in favor of Riccardo. *Payne,* 146 F.3d at 432.

A jury could have reasonably believed that Lt. Rausch was deliberately indifferent to the substantial risk of harm to Riccardo. It is undisputed that Garcia was a member of the Latin Kings. In their first interaction, Riccardo privately

pulled Lt. Rausch aside and expressed his fear of being celled with Garcia. Thus, Riccardo has presented sufficient evidence to support the finding that Lt. Rausch was made aware of the potential harm. *See McGill,* 944 F.2d at 349. The jury could have further found that Lt. Rausch's decision to question Riccardo in front of Garcia was not a reasonable way to abate the potential danger to Riccardo. Moreover, Lt. Rausch admitted that "[i]f [Riccardo] would have told me he feared for his life, if he refused housing or thought there was a threat to his safety[,] he would not have been placed – they would not have been placed together." Tr. III at 73. Thus, a jury could have determined that Lt. Rausch's admission, coupled with his prior statements to Riccardo on May 28 that Riccardo could not turn down a housing assignment in segregation, and that Riccardo could not be moved to another cell due to a lack of space, amounted to Lt. Rausch "deliberately" avoiding learning that Riccardo was in danger.[3] Such an analysis avoids the use of *ex post* occurrences, such as the fact that Garcia did in fact assault Riccardo, to sustain a finding of deliberate indifference. Moreover, the fact that Lt. Rausch

[3] Significantly, Riccardo was actually housed in the receiving unit as opposed to the segregation unit during the assault. The jury heard testimony that the receiving unit is only used to house inmates when the segregation unit is full. Tr. I at 24. Thus, Lt. Rausch's statement to Riccardo that there was no place else to house him carried even greater weight. The jury also heard testimony that it would have required more work for Lt. Rausch to move Riccardo from a cell in receiving to a cell in segregation due to the time of the alleged refusal and the occupancy of receiving and segregation, Tr. III at 75-77; further supporting Riccardo's belief that any additional complaints about his cell assignment would have been futile. Finally, the jury was told a prisoner may be moved from one cell to another at any time. Tr. I at 25. Therefore, the jury had ample evidence to support its finding that Lt. Rausch's actions rose to the level of deliberate indifference.

is able to point to evidence in the record to support his position does not mandate reversal of the jury's verdict. Our sole duty as an appellate court is to analyze whether the record supports the jury's determination. It is not our function to reweigh the evidence. *Knox,* 93 F.3d at 1332.

I am further troubled by the majority's reliance on Riccardo's second statement to Lt. Rausch (made in front of Garcia) to sustain overturning the jury's verdict. As it stands, the deliberate indifference inquiry is an inherently factual determination, *Farmer,* 511 U.S. at 842, 114 S.Ct. 1970, which requires an "inquiry into a prison official's state of mind," *id.* at 837, 114 S.Ct. 1970.[4] Thus, whether this second statement is used to support the assertion that there was no "objective" risk to Riccardo or that Lt. Rausch was stripped of his "subjective" knowledge of the harm, it is clear that Lt. Rausch's credibility and sincerity are integral components to the usefulness of this interaction. In essence, the majority accepts Lt. Rausch's assertion that his second discussion with Riccardo in front of

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[4] The Supreme Court's discussion only further highlights the propriety of allowing a jury to make this determination:

> When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough to merely find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly.

Id. at n. 8, 114 S.Ct. 1970; *accord Lewis v. Richards,* 107 F.3d 549, 556 (7th Cir.1997) (Flaum, C.J., concurring) ("In view of the Supreme Court, the safeguard against jurors whose outrage at prison violence might lead them to sanction officials in the absence of an Eighth Amendment violation is not a relaxed summary judgment standard, but jury instructions that properly convey the applicable law. Lower federal courts, in my view, should exhibit a similar faith in the willingness of juries to follow the law.").

Garcia was a sincere investigation of the potential risk to Riccardo. However, the jury found otherwise. Further, when asked to review the defendant's Rule 50 motion, the district court aptly stated,

> [T]here is ample evidence from which to conclude that Rausch's attempt to ascertain the seriousness of the threat was mere pretense, and that because he did not want to go to the extra effort to find different accommodations for Garcia, he recklessly disregarded what he knew to be a dangerous situation. That decision to essentially disregard the threat is where liability lies. A jury could have reasonably inferred that Rausch crossed the line from gross negligence to deliberate indifference based on the ludicrousness of "asking" each inmate if he had a problem with the other. Credibility had to have been the key to the jury's analysis, thus the Court cannot interject its own credibility determinations; and if it could, having observed both parties' testimony, it may well have reached the same conclusion as the jury. [. . .]
>
> [A] prison official will only be freed from liability if he responded *reasonably* to the risk. As mentioned above, Rausch's method of questioning could be perceived as deliberately forcing plaintiff to make a Hobson's choice.

Riccardo v. Rausch, No. 99-CV-372-CJP, at 15 (S.D.Ill. Mar. 7, 2002) (order denying F.R.C.P. Rule 50(b) motion) (citations omitted) (emphasis in original). By taking Lt. Rausch at his word, the majority's decision has the effect of immunizing prison officials from liability based on potentially unreasonable or contrived actions, and sanctions Lt. Rausch's admittedly unreasonable behavior.

In an attempt to break the causal link between Lt. Rausch's actions and the harm to Riccardo, the majority asserts that "the risk that Riccardo professed to fear (a 'hit') did not come to pass." Majority opinion at 526. The inquiry, however, is not whether "a hit" was actually put out on Riccardo as that would constitute the sort of impermissible *ex post* determination eschewed by the majority. Rather, the focus is solely on whether Rausch was made aware that a substantial risk of *some type* of danger existed prior to the actual event. *See Haley,* 86 F.3d at 643 n. 33. Under the majority's analysis are we to presume that Riccardo's pleas for protection would only guard against murder or physical beating? For the purposes of an Eighth Amendment inquiry, in the prison context, I find no real distinction between "a hit" and a sexual assault.

The majority also frees Lt. Rausch of liability based on the assertion that Lt. Rausch was under no duty to foresee that Riccardo would not complain to other prison officials between May 28, the date of Lt. Rausch and Riccardo's interaction, and May 30, when the assault actually took place. The record reveals, however, that Garcia closely watched Riccardo's actions impeding Riccardo's ability to have a private conversation with prison guards outside of Garcia's presence. Tr. I at 76-82; Tr. II at 42-43. Further, when Riccardo attempted to alert prison officials, Garcia responded with escalating violence. Tr. II at 46-47. In light of Riccardo's reasonable belief that he could not refuse his housing assignment and that there was no other available cell, *see* note 3, *supra,* Riccardo did not realistically have the ability to complain to other guards without alerting Garcia and incurring his wrath.

The majority's decision to question the adequacy of Riccardo's pleas for protection by requiring evidence

concerning the overall number of sexual assaults at Centralia prison is also curious. *See Lewis,* 107 F.3d at 556 (Flaum, C.J., concurring) ("[T]he majority's emphasis upon the adequacy of Lewis's pleas for protection strikes me as inappropriate.") The prison recognizes that "some prisoners are manipulative and cry 'wolf'," majority opinion at 525, and has created a procedure to deal with this recurring possibility. A prisoner's request for a cell transfer is always honored if the prisoner alleges a fear for his personal safety, Tr. I at 44, but the prison deals with potential frivolity by treating every request as a potential disciplinary violation. *Id.*[5] Thus, the prison has created a procedure whereby a prisoner is moved first, and questions concerning the sincerity of the request are asked later. In addition, the inquiry under the Eighth Amendment is an individualized one, i.e., Riccardo was required to prove, based on the individual facts of his case, that he was subjected to an objectively serious harm and that Lt. Rausch was "aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed]." *Farmer,* 511 U.S. at 838, 114 S.Ct. 1970.

Finally, though unpursued by the majority, defendant argues that should a constitutional violation be found, he is nevertheless entitled to qualified immunity. According to Rausch, previous case law must show that "no reasonable prison official would have believed it was constitutional either to cell an inmate with someone who gave conflicting answers when asked (in the other inmate's presence) if he had a problem with that inmate, or to rely on a policy

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[5] Major Lawrence Jefferson was clear that "if [a prisoner is] just refusing housing just to refuse housing with no reason, then we'll move him for that, but he'll get a ticket for that." *Id.*

requiring review of all placement decisions for suitability within hours." Appellant's Brief at 33. However, the Supreme Court in *Hope v. Pelzer*, expressly rejected the notion that in order for a right to be "clearly established" previous case law must contain facts which are "materially similar" to the facts contained in the underlying action. 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002); *see also Burgess v. Lowery,* 201 F.3d 942, 944-45 (7th Cir.2000). Rather, the Court focused on whether the prior case law would place officers on notice that their conduct is unlawful. *Id.* It is clear that *Farmer* put prison guards on notice that they have a duty, under the Eighth Amendment, to protect inmates from being gratuitously beaten or raped by other inmates. *See id.* at 833, 114 S.Ct. 1970; *see also Haley,* 86 F.3d at 646 (rejecting qualified immunity defense in light of *Farmer* decision which further elucidated "deliberate indifference" standard).

In light of the aforementioned, I must agree with the trial court that a reasonable jury had ample evidence to sustain this verdict and thus I respectfully dissent.

Before FLAUM, Chief Judge, and POSNER, EASTERBROOK, RIPPLE, MANION, KANNE, ROVNER, DIANE P. WOOD, EVANS, and WILLIAMS, Circuit Judges.[†]

Plaintiff-appellee filed a petition for rehearing and rehearing en banc on March 12, 2004. In response to this petition, the panel has amended its opinion; the amendments are reflected in the immediately preceding revised opinion. A majority of the judges on the panel voted to deny rehearing. A judge called for a vote on the petition for

[†] Circuit Judge Sykes did not participate in the consideration or decision of this case.

rehearing en banc, but a majority of the active judges did not favor rehearing en banc. Accordingly, the petition is denied.

RIPPLE, Circuit Judge, with whom ROVNER, DIANE P. WOOD and WILLIAMS, Circuit Judges, join, dissenting from the denial of rehearing en banc.

Today, the court allows to stand the decision of a panel majority that imposes on prison inmates a new and impossibly high standard of proof for establishing deliberate indifference in prison condition cases. The panel majority strongly suggests that, in order to show deliberate indifference, a prisoner must not only identify with particularity the harm he fears but also bolster his own account with a special showing containing material such as statistical evidence of a "strong correlation between prisoners' professions and actual violence." *Riccardo v. Rausch,* at 527. Neither of these requirements find support in circuit or Supreme Court precedent. Consequently, the panel majority's imposition of these requirements not only does violence to our Eighth Amendment jurisprudence, but it also effectively amends, without any legislative mandate, the standard for judgment as a matter of law under Federal Rule of Civil Procedure 50 for cases brought by prisoners.

1.

Mr. Riccardo told Lt. Rausch that the Latin Kings had put out a "hit" on him and that placement in a cell with Garcia, a known Latin King, would endanger his life. Two days later, Mr. Riccardo was forced to perform sexual acts with Garcia. The panel majority nevertheless concludes that this evidence is not sufficient to establish that Lt.

Rausch should have appreciated a serious risk to Mr. Riccardo because the "risk from which Riccardo sought protection was not realized." *Id.* at 526. In short, in the panel majority's view, because Mr. Riccardo was raped, but not killed, Lt. Rausch cannot be held liable for his failure to respond to Mr. Riccardo's fears.

The Supreme Court in *Farmer v. Brennan,* 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), eschewed this sort of distinction. The Court made clear that a prison official cannot escape

> liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault. The question under the Eighth Amendment is *whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial "risk of serious damage to his future health," Helling* [*v. McKinney,* 509 U.S. 25, 35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993),] and it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.

Id. at 843, 114 S.Ct. 1970 (emphasis added). Just as Mr. Riccardo did not need to identify the member of the Latin Kings who would mete out the retaliatory action that he feared, he did not need to identify the specific sort of bodily harm that would be inflicted upon him. Indeed, our case law makes crystal clear that such precision with respect to identifying risks is not required:

> While there must be some link between the risk of which the official was aware and the harm that actually occurred – as it would be unfair to hold officials liable for risks they could not have anticipated simply because they ignored other unrelated risks – prison officials need not be specifically aware of the precise risk that unfolds.

Haley v. Gross, 86 F.3d 630, 643 n. 33 (7th Cir.1996). Mr. Riccardo feared reprisal by the Latin Kings. Garcia, a member of that gang, committed an act of physical violence upon Mr. Riccardo. The fact that Mr. Riccardo did not suffer a worse fate does not negate the seriousness or the validity of the threat to Mr. Riccardo that was communicated to Lt. Rausch.

2.

The panel majority further opines that Mr. Riccardo might have overcome the infirmity in his case by showing

> that there is a strong correlation between prisoners' professions of fear and actual violence. How many murders (or homosexual assaults) occur in Centralia (or the Illinois prison system) per hundred inmate-years of custody? How many violent events were preceded by requests for protection? How many requests for protection were dishonored, yet nothing untoward happened? Data along these lines would have enabled a jury (and the court) to evaluate actual risks. . . .

Riccardo, at 527. Neither this court, other courts of appeals, nor the Supreme Court ever has required a showing that expressed fears and violence were related in some statistically significant way. It always has been sufficient that the prisoner articulated his fear, that the prison

official believed the inmate, but that the official failed to take reasonable actions to protect the prisoner from harm. We often have stated that

> [i]f "the *circumstances* suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk."

Sanville v. McCaughtry, 266 F.3d 724, 737 (7th Cir.2001) (quoting *Farmer,* 511 U.S. at 842-43, 114 S.Ct. 1970; emphasis added). The question of whether the prison official had the "requisite knowledge is a question of fact" reserved for the jury. *Id.* Requiring the sort of statistical evidence suggested by the panel majority in order to establish the existence of such a risk imposes on inmates a practical burden that is impossible for prisoners to meet. Prisoners certainly should not be relieved of meeting their burden of proof, but, like other litigants, they ought to be permitted to come forward with any evidence, direct or circumstantial, that is probative of the knowledge of prison officials concerning threats reported to them. The judicial inquiry ought not be whether there was *statistical* evidence from which a jury could conclude that the threat was "real" or should be taken seriously, but whether the record contains *any* evidence from which the jury reasonably could conclude that the prison official knew that the prisoner was subject to a risk of serious harm. Moreover, there indeed may be times and circumstances when the representation of the prisoner will be a sufficient basis to require action on the part of the prison official. I see no

reason for a categorical rule that, under no circumstances, can such a representation be sufficient.

There is no question that Mr. Riccardo articulated to Lt. Rausch his fear of physical violence if celled with a member of the Latin Kings. In violation of Centralia's own policy – one presumably founded on a recognized correlation between complaints and violence – Lt. Rausch did not move Mr. Riccardo to another cell; instead, Lt. Rausch forced Mr. Riccardo to articulate any concerns in the presence of the very source of Mr. Riccardo's fears, Garcia. As the district court determined in rejecting the defendant's Rule 50 motion, there was

> ample evidence from which to conclude that Rausch's attempt to ascertain the seriousness of the threat was a mere pretense, and that because he did not want to go to the extra effort to find different accommodations for Garcia, he recklessly disregarded what he knew to be a dangerous situation. That decision to essentially disregard the threat is where liability lies. A jury could have reasonably inferred that Rausch crossed the line from gross negligence to deliberate indifference based on the ludicrousness of "asking" each inmate if he had a problem with the other. Credibility had to have been the key to the jury's analysis, this Court cannot interject its own credibility determinations; and if it could, having observed both parties' testimony, it may very well have reached the same conclusion as the jury. R.64 at 15-16.

The panel majority makes clear its disagreement with the jury's view of the evidence. The evidence in favor of Mr. Riccardo may not be overwhelming, but it is certainly not legally insufficient. When the evidence is viewed in the

light most favorable to Mr. Riccardo, as it must be, a jury could reasonably conclude that Lt. Rausch knew of a serious risk of harm to Mr. Riccardo but failed to take reasonable steps to prevent it. The panel majority may have come to a different conclusion if it had sat as the trier of fact, but its disagreement in that respect is certainly not an appropriate occasion for revising Eighth Amendment and Rule 50 standards.

The panel majority opinion not only deprives Mr. Riccardo of his right to a jury trial, it also takes a very significant step in depriving individuals incarcerated in this circuit of a realistic opportunity to meet their burden of proof in these cases. I therefore respectfully dissent from the denial of rehearing en banc.

WILLIAMS, Circuit Judge, with whom RIPPLE, ROVNER, and DIANE P. WOOD, Circuit Judges, join in dissenting from the denial of rehearing en banc.

The majority's opinion has incorrectly resolved and unjustifiably reframed both the Eighth Amendment standard for deliberate indifference as well as the Rule 50 standard to set aside a jury verdict.

With regard to the Eighth Amendment inquiry, the majority opinion highlights a major gap in the case law. Particularly, what is required to prove the objective prong of the deliberate indifference standard? The Court in *Farmer v. Brennan,* 511 U.S. 825, 834 n. 3, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) did not address this issue. On page 526-27, the majority asks a plethora of questions which go to this issue, i.e., the overall threat of violence at the prison. Perhaps the dearth of case law on this point is due in part to the general knowledge that prisons are dangerous places where rape and assault occur frequently and

therefore threats, such as the one in this case, must be handled with more caution than exhibited by Rausch. *See* Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601-02 (2004) ("The purpose of this chapter is to: (1) establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States. (6) increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape.") ("Congress makes the following findings: (2) Insufficient research has been conducted and insufficient data reported on the extent of prison rape. . . . Many inmates have suffered repeated assaults. (13) The high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution."). Centralia Prison's policy, to move prisoners first and discipline them later for baseless requests, is further proof of the objective danger. Again, evidence of the prison's policy does not hold Rausch liable for mere negligence; rather, it reflects the understood environment in the prison, as accepted by prison officials, guards, and administrators, that threats of violence have a high probability of leading to attacks. Riccardo, therefore, proved that the asserted danger was objectively serious.

Under the more specific inquiry of *Farmer's* subjective prong, the prison official must "deliberately disregard" a potential harm by being "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [also] draw[ing] the inference." *Id.* at 838, 114 S.Ct. 1970. This seems to me to create two questions: (1) what facts were presented to Rausch, and (2) did he accept them as true or did his actions evince his intent to purposefully ignore those apparent facts? Once again, the inquiry is a particularized one, focused on the officer's knowledge. Without repeating what I have already set out in my dissent, the jury was presented with evidence that

Riccardo told Rausch he did not want to be celled with Garcia because he was in fear of an attack. "A prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." *McGill v. Duckworth,* 944 F.2d 344, 349 (7th Cir.1991). Therefore, contrary to the majority's assertion, the first part of this inquiry is satisfied.

Accepting the majority's point that Riccardo's mere "say-so" is not enough to establish Eighth Amendment liability, there were plenty of "objective indicators" to support the jury's finding that Rausch's actions amounted to deliberate indifference. The jury heard evidence that Rausch put the two men in front of each other to determine whether a problem existed. It is this act, which the majority uses to exonerate Rausch from liability. However, it is this very act which evinces Rausch's deliberate indifference as found by the jury and reiterated by the district court. What is more, this court has already defined such action as unacceptable under the Eighth Amendment. *Id.* at 349 (reasoning that the scienter requirement is satisfied when a prison guard, "[s]uspect[s] something is true but shut[s] [his] eyes for fear of what [he] will learn" or "[goes] out of [his] way to avoid acquiring unwelcomed knowledge"). The jury found that no reasonable guard would think that asking Riccardo to admit fear of Garcia with Garcia present, would illicit an honest response. Again, it is this act that crosses the line. Recognizing that these specific actions were inconsistent with the Eighth Amendment would not create *per se* liability for prison officials. Therefore, I respectfully dissent from the court's decision not to rehear this case en banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ANTHONY RICCARDO,	)	
Plaintiff,	)	
V.	)	Civil No. **99-372-CJP**[1]
LT. LARRY RAUSCH,	)	
Defendant.	)	

ORDER

(Filed Mar. 07, 2002)

PROUD, Magistrate Judge:

Plaintiff Anthony Riccardo, an inmate at Centralia Correctional Center, was sexually assaulted in May 1997 by fellow inmate Juan Garcia[2] Plaintiff sued defendant Lt. Larry Rausch, the prison guard who had personally celled plaintiff and Garcia together, asserting that Rausch celled plaintiff and Garcia together even after plaintiff told Rausch he feared for his life if he and Garcia were celled together. At trial Lt. Rausch testified that he had no recollection of the events at issue. A jury found that Lt. Rausch had been deliberately indifferent to a substantial

[1] Pursuant to 28 U.S.C. § 636(c), upon the consent of the parties to have this case tried or otherwise resolved by a U.S. Magistrate Judge, this matter was transferred from Chief U.S. District Judge G. Patrick Murphy to U.S. Magistrate Judge Clifford J. Proud. (Docs. 45 and 46).

[2] Defendant does not seriously argue that a sexual assault did not occur, although he intimates as such in connection with his attack on the award. Therefore this Court will only observe that plaintiff's testimony and the Illinois Department of Corrections' report concluding that, based on incident reports, voluntary statements, physical injuries, and polygraph results, a sexual assault did occur, were unrefuted.

risk of serious harm, in violation of the Eighth Amendment's prohibition against infliction of cruel and unusual punishment; plaintiff was awarded $1.5 million.

Defendant Rausch is now before the Court pursuant to Federal Rules of Civil Procedure 50(b) and 59, seeking judgment as a matter of law and/or a new trial, (Docs. 56 and 58). Defendant presents the following arguments:

1. Plaintiff did not establish that he faced an objectively substantial risk of serious harm, or that defendant possessed the requisite subjective knowledge from which deliberate indifference could be inferred;

2. Defendant's actions were not the proximate cause of plaintiffs injuries, in that the causal chain was broken;

3. Defendant is entitled to qualified immunity; and

4. The damages award is grossly excessive.

(Docs. 56 and 58).

In contrast, plaintiff relies heavily on the fact that, in a situation such as this, where the jury had to choose between two possible interpretations of events, so long as there is sufficient evidence to support the jury's verdict, that verdict should not be upset. *Cygnar v. City of Chicago,* 865 F.2d 827, 834-835 (7th Cir. 1989). More specifically, plaintiff argues that the verdict reflects the jury's inference from the evidence that Lt. Rausch acted (or failed to act, depending on one's perspective) out of deliberate indifference, Plaintiff further contends that defendant's assertion that the causal chain was broken is speculative at best. Defendant's assertion of qualified immunity is

countered by citation to *Farmer v. Brennan*, 511 U.S. 825 (1994), and *Billman v. Indiana Department of Corrections*, 56 F.3d 785 (7th Cir. 1995), for the proposition that, at the time of the May 1997 assault, it was clearly established that cell placement decisions can violate the Eighth Amendment. Finally, plaintiff notes numerous multi-million dollar verdicts from non-prisoner sexual assault cases as precedents for the size of the award in this case.

Applicable Legal Standards

Insofar as defendant seeks judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 50(b), the relevant inquiry is "'whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in a light most favorable to the party against whom the motion is directed.'" *Cygnar v City of Chicago*, 865 F.2d 827, 834 (7th Cir. 1989) (quoting *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210, 1213 (7th Cir.1985)). The Court may not "resolve conflicts in testimony or weigh and evaluate the evidence, functions that are reserved to the fact finder." *Cygnar*, 865 F.2d at 834 (citing *Anderson v. Gutschenritter*, 836 F.2d 346, 348 (7th Cir.1988)).

A slightly different standard is applicable to motions for new trial under Federal Rule of Civil Procedure 59, "'The test to be applied in determining whether a motion for a new trial should be granted is whether "the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving."'" *Cygnar*, 865 F.2d at 834-835 (quoting *General Foam Fabricators v. Tenneco Chemicals, Inc.*, 695 F.2d 281, 288 (7th Cir.1982)).

The Evidence

Defendant Rausch's relevant contact with plaintiff was very brief; he was merely the one who celled plaintiff and his attacker together the night of May 28, 1997 – approximately 48 hours before plaintiff was allegedly forced to perform oral sex on his cellmate, inmate Garcia. Although it is undisputed that Rausch did cell plaintiff and Garcia together, Rausch has no recollection of any of the relevant events, (Tr. III, p. 69). In any event, a longer, more detailed chronology of events, drawn from the entire record, is necessary to understanding both plaintiff's claim for damages and defendant's arguments regarding deliberate indifference and proximate cause.

In 1996, plaintiff Anthony Riccardo was convicted of aggravated assault – stalking a former girlfriend – and sentenced to 39 months imprisonment, with credit for 152 days. (*See* Tr. I, p. 58; and Plaintiffs Exhibit 22 (12/2/96 Mental Health Report)). It is unrefuted that in October 1996, while in the Cook County Jail, plaintiff was anally raped by his cellmate. (Tr. I, pp. 60-61; *see also* Plaintiff's Exhibit 22 (6/19/97 Mental Health Evaluation)). Upon arrival at Centralia Correctional Center in November 1996, plaintiff voiced concerns about his safety, and he indicated to the prison psychologist that be planned to seek protective custody. (Tr. I, p. 61; and Plaintiff's Exhibit 22 (11/19/96 Mental Health Evaluation)). A psychologist subsequently noted that plaintiff's initial adjustment to his new environment was "slightly difficult." (Plaintiff's Exhibit 22 (12/2/96 Mental Health Evaluation)).

A few months later, in April 1997, plaintiff was ticketed and placed in segregation for placing a towel over the bathroom window in order to prevent a female guard from

being able to see him while be was using the bathroom. (Tr. I, pp. 62-63; Plaintiff's Exhibits 6 and 9). In a related grievance, plaintiff explained that be had covered the window because he had been raped and consequently had issues about privacy. (Tr. I, pp. 62-63; Plaintiff's Exhibits 6 and 9). Plaintiff's initial punishment of one month in segregation was reduced to 15 days, (Plaintiff's Exhibit 9). On May 21, 1997, plaintiff completed his time in segregation and was sent to a cell in the receiving unit to await placement back in the general prison population. (Tr. I, p. 63).

While in receiving, plaintiff's personal property was taken, presumably by his cellmate, who was a member of the Latin King gang. (Tr. I, pp. 63-66; Plaintiff's Exhibit 6). Plaintiff was seen telling a guard about his missing property; he then became fearful of retaliation and refused to return to his cell (Tr. I, pp. 67-68). Consistent with prison policy, plaintiff's desire not to be celled with a purported enemy was honored, resulting in his immediate return to segregation for refusing housing. (Tr. I, pp. 25, 29 and 68; Plaintiffs Exhibit 4 (5/21/97 6:30 p.m. entry)). Plaintiff was placed in "pre-disciplinary detention" so that his claimed enemies could be confirmed. (Tr. I, p. 67-68; Plaintiff's Exhibit 7). Essentially, if a prisoner's request for different housing is substantiated, no disciplinary action is taken. (Tr. I, 43-45). On May 22, 1997, apparently because of a housing crunch in segregation, plaintiff was moved to a cell in the adjacent receiving building. ((Plaintiff's Exhibit 4 (5/22/97 2:15 p.m. entry); Tr. III, pp. 74-77).

On May 28th, plaintiff spoke with inmate Garcia, who purportedly could help plaintiff get his property back from the gang members who had taken it. (Tr. I, p. 70). Garcia was a known Latin King, although he allegedly had Latin

King enemies, too. (Tr. III, pp. 55-56; Plaintiff's Exhibit 11). Plaintiff "didn't feel comfortable" after speaking with Garcia, so plaintiff spoke with Lt. Alemond, the first shift segregation lieutenant, explaining that he did not want to be celled with inmate Garcia – that he feared for his life. (Tr. I, pp. 72-73). According to plaintiff, Lt. Alemond, who as segregation lieutenant was in charge of housing decisions during his shift, assured him that he would "take care of it" (Tr. I, p. 73; Plaintiff's Exhibit 3). However, around 9:25 p.m. that night, defendant Rausch, the second shift segregation lieutenant, arrived with plaintiffs new cellmate, inmate Garcia. (Tr. I, pp. 73-74). Plaintiff describes panicking, and eventually getting Lt. Rausch aside in the nearby day room so that he could explain that he "fear[ed] for his life" because the Latin Kings had a "hit" on him, that Garcia was a Latin King, and that Lt. Alemond had agreed earlier that plaintiff would not be celled with Garcia. (Tr. I, pp. 74-75). According to plaintiff, Lt. Rausch told him that he, Rausch, would "straighten this out." (Tr. I, p. 75). Rausch then brought plaintiff and Garcia together and asked each, in turn, if he had a problem with the other. (Tr. I, p. 75). Garcia stated that he did not have a problem with plaintiff; plaintiff, feeling like he was "on the hot seat," shook his lead in the negative. (Tr. I, p. 75). Consequently, Garcia and plaintiff were celled together. Later that night, Garcia questioned plaintiff about whether he was trying to start trouble. (Tr. I, p. 77).

According to procedure, housing assignments, such as the one at issue, made after the Placement Office's normal business hours, are to be reviewed the next day by the Placement Office to ensure that cellmates are compatible in terms of security and safety concerns. (Tr. I, pp. 37-41;

Tr. III. P. 71). There is no further evidence on this point. In addition, an institutional directive provides that the segregation lieutenant will conduct a review of double celling arrangements to be forwarded to the chief of security, taking into consideration predatory, aggressive or assaultive behavior, emotional instability or medical concerns, documented enemies, gang affiliation, classification status, physical size, etcetera. (Tr. I, pp. 35-36). Because the Placement Office was closed at the time the decision to cell plaintiff and Garcia together was made, defendant Rausch would have had to have done the best evaluation of their compatibility possible under the circumstances. (Tr. I, p. 36). There is no documentary evidence on what suitability review was done relative to plaintiff and Garcia. (Tr. III, p. 78). Lt. Rausch acknowledged that prison policy is that a prisoner in segregation who states that he does not want to be celled with another is not housed with that inmate. (Tr. III, pp. 69-70). However, Rausch also acknowledged that at the time segregation was full, and if a segregation inmate celled in receiving refused housing and had to be placed back in segregation, things became a bit more complicated because inmates would have to be shuffled around between segregation and receiving. (Tr. III, pp. 74-77). Rausch hypothesizes that if one inmate said he had a problem with another, he, Rausch would ask each if there was such a problem – but he would ask them separately if one inmate had indicated he feared for his life. (Tr. III, pp. 79-80).

When asked why he had not instantly refused to be celled with Garcia, similarly to how he had refused housing just a few days earlier, plaintiff explained that, first, Lt. Rausch had put him on the "hot seat" in front of Garcia; second, Rausch told him that nothing could be

done about his "bad feelings" about Garcia; and third, Rausch, misinformed him that he could not refuse housing, that there was no space to move him. (Tr. II, pp. 30-31). Plaintiff further elaborated that Garcia was much bigger and he feared exacerbating the situation. (Tr. I, p. 76).

The morning after Garcia was celled with plaintiff, May 29th, plaintiff claims to have written two grievances, one regarding his stolen property, the other about health care. (Tr. I, p. 79). Plaintiff had hoped that a psychologist or psychiatrist would ask to see him, giving him an opportunity to speak away from Garcia. (Tr. I, pp. 79-80). Later in the day, motivated by Garcia's promise to get the "hit" off of him and to ensure the return of some of his stolen property, plaintiff agreed to send money to Garcia's parents with instructions that the money be sent back to Garcia in prison – a sort of money laundering scheme designed to evade prison rules against prisoners exchanging money. (Tr. I, p. 77). Again, plaintiff hoped to somehow attract the attention of prison officials so that he could express his concerns about Garcia (Tr. I, pp. 77-80; Plaintiff's Exhibit 8). Eventually, the money transfer did attract the attention of prison officials, but not until after plaintiff was attacked by Garcia.

The next afternoon, May 30th, Garcia suggested that plaintiff needed a haircut, and that he was the man for the job. (Tr. I, p. 80; Tr. III, p. 48). Plaintiff agreed to allow Garcia to trim his hair with a razor, which turned into a hatchet job of sorts. (Tr. I, p. 80; Plaintiff's Exhibit 16). While plaintiff was getting his head shaved, Correctional Officer Watson happened by, at which time Garcia asked plaintiff to finish his own haircut. (Tr. I, p. 81; Tr. III; p. 48). Officer Watson saw plaintiff shaving his own head,

with Garcia offering direction. (Tr. III, p. 48). According to plaintiff, Officer Watson, seeing the bloody nicks on plaintiff's head, suggested that plaintiff might want to go to the Health Care Unit, at which point Garcia took over the conversation, interjecting that plaintiff did not need to leave. (Tr. I, P. 82; Plaintiffs Exhibit 16). Plaintiff mouthed "Help me," but Officer Watson apparently missed this silent plea for help. (Tr. I, P. 82). After the correctional officer left, Garcia slapped and punch plaintiff on the head. (Tr. I, p. 82).

Plaintiff acknowledged that he had multiple opportunities to speak with correctional officers, such as when officers made periodic rounds throughout the day and night, when meals were served, when his grievances and mail were collected, and the like. (Tr. I, pp. 78-82; Tr. II, pp. 35-37). But, plaintiff felt trapped and scared, and he did not know what to do to extricate himself from the situation. (Tr. II, pp. 36-37). He perceived that two of the officers he had direct contact with would not aid him because he had had previous issues with them. Plaintiff generally explained:

> I accepted the fact that I'm in jail and this ain't the Holiday Inn and I know that and this ain't the Burger King, so I know if I have a qualm with somebody, that I've got to deal with that and it's my problem and that's it. Because there was things – because I felt this way that this person may – I didn't know, he didn't do nothing at the time, and I was told that I couldn't refuse housing, . . .

(Tr. II, p. 37).

On the night of May 30th, Garcia indicated that he wanted to have anal sex with plaintiff, despite plaintiff

indicating he did not want this to happen – Garcia ejaculated on plaintiff's feet instead. (Tr. I, pp. 83-84). Later that same night, Garcia forced plaintiff to perform oral sex on him for what plaintiff estimated to be 15 minutes – when Correctional Officer Watson appeared again, asking if they wanted some ice. (Tr. I, p. 84; Tr. III, p. 43). At that instant, plaintiff exited the cell, crouched in a nearby corner, in a fetal position, crying. (Tr. I, p. 84; Tr. III, pp. 43-44). When plaintiff told Officer Watson that Garcia had forced him to shave his bead, beat him, and then forced him to perform oral sex, Watson informed other prison officials and moved plaintiff to the Health Care Unit. (Tr. III, pp. 43-44).

Medical Progress Notes for May 30, 1997, indicate that plaintiff reported that Garcia had forced him to perform oral sex, and that Garcia had ejaculated in his mouth; the head shaving, slapping and punching were also reported. (Plaintiff's Exhibit 23 (5/30/97 10:40 p.m. entry)). However, forensic tests were negative. (Plaintiff's Exhibit 11). Nevertheless, an Illinois Department of Corrections Internal Affairs investigation report indicates that Garcia subsequently admitted to shaving plaintiff's head. (Plaintiff's Exhibit 11). The investigation further found that plaintiff had been intimidated by Garcia into transferring funds, against prison regulations. (Plaintiff's Exhibit 11). Ultimately, the report concluded:

> Based on incident reports, voluntary statements, physical injuries, and polygraph exam results, Internal Affairs substantiates that Inmate Riccardo K50995 was intimidated into performing oral sex on Inmate Garcia N34024 on May 30, 1997.

(Plaintiff's Exhibit 11).

The nurse who initially saw plaintiff testified that plaintiff was severely distressed. (Tr. I, p. 54). Plaintiff was placed on a suicide watch from the night of May 30th until the morning of June 2nd when he was discharged from the Health Care Unit. (Plaintiff's Exhibits 19-21; Plaintiff's Exhibit 23 (6/2/97 entry)). Plaintiff reported stress, feelings of vulnerability, difficulties sleeping and flash backs to health care officials, who noted that Post Traumatic Stress Disorder (PTSD) was possible. (*See* Plaintiff's Exhibit 23 (6/4/97-6/24/97 entries)). Plaintiff was transferred from Centralia Correctional Center to Sheridan Correctional Center, where it was determined that he was not to be celled with another inmate. (Plaintiff's Exhibit 23 (6/24/97-9/12/97 entries)). Medical Progress Notes through June 28, 2000, reflect persistent complaints anxiety and apprehension, trouble sleeping, and the like. (*See* Plaintiff's Exhibit 23).

In June 1997, Dr. Isaac Suh, a prison psychiatrist, diagnosed plaintiff as having an adjustment disorder; PTSD was a diagnosis yet to be ruled out. ((Plaintiff's Exhibit 22 (6/19/97) entry)). This tentative diagnosis persisted until October 1999 when psychologist Sherry Kalicak concluded that plaintiff did suffer from PTSD. (*See* Plaintiff's Exhibit 22 (10/25/99 entry)). In contrast, psychologist Daniel Kozubal concluded around that same time that plaintiff suffered from a possible narcissistic personality disorder. (*See* Plaintiff's Exhibit 22 (11/18/99 entry)). Social worker Blomquist subsequently adopted the narcissistic diagnosis, too. (*See* Plaintiff's Exhibit 22 (4/5/00 entry)). In March 2001, Dr. Kalicak revised her diagnosis, finding that plaintiff's adjustment disorder was in full remission and medication could be discontinued. (Tr. II, p. 23). Nevertheless, Blomquist testified at trial that, to this

day, he still has not ruled out PTSD, and that symptoms persist. (Tr. II, p. 25). However, overall, Blomquist reported that having met with plaintiff almost 28 times, plaintiff seems future oriented and relatively sociable. (Tr. III, pp. 4-5, 14 and 30-31).

Dr. Kozubal, the clinical psychologist at Sheridan Correctional Center who saw plaintiff on two occasions, testified at trial and characterized plaintiff as having "a bit of an adjustment disorder with some anxiety" – "one of the most common diagnoses within our prison situation, given the nature of life in an institution having to do with the stress of living closely with other people, not in a place of one's choice." (Tr. II, pp. 170 and 173). However, upon learning that the sexual assault had been substantiated by Internal Affairs, Dr. Kozubal acknowledged that PTSD was a viable diagnosis, and that testing and being able to review all of plaintiff's medical records would be of great assistance in rendering a diagnosis. (Tr. II, pp. 175-184, and 188-189; Tr. III, p. 35).

In contrast, plaintiff's retained psychologist, Dr. Tony Fletcher, testified that after evaluating plaintiff for approximately four hours, reviewing medical records, and conducting a battery of tests, he concluded, to a reasonable degree of medical certainty, that plaintiff did suffer from PTSD. (Tr. II, pp. 54-55, 79-80, 83, and 109). Furthermore, Dr. Fletcher noted that the validity indicators in the tests administered to plaintiff were consistent, showing no signs of minimization or exaggeration of plaintiff's psychological difficulties, or malingering. (Tr. II, pp. 73, and 80-82). The trouble sleeping, outbursts of anger, panic attacks, depression, anxiety, hyper-vigilance, emasculation, and identity confusion that plaintiff complains of are consistent with a prominent anxiety disorder. (*See* Tr. II, pp. 75-80 and 91).

Dr. Fletcher explained that plaintiff's alleged inability to take advantage of those situations where he could have sought the help of corrections officials – his paralysis – was typical of a stress disorder. (Tr. II, pp. 67-70, 106, and 117-118). With regard to the Garcia incident being the second time plaintiff was sexually assaulted, Dr. Fletcher felt that the second incident was the "straw that broke the camel's back." (Tr. II, p. 100). Predicting plaintiff's long term prognosis, Dr. Fletcher noted that 13% continue to exhibit PTSD symptoms after 15 years, but that PTSD can get better, or worse, and may remit. (Tr. II, pp. 104).

The jury found in favor of plaintiff and awarded plaintiff $1.5 million. (Tr. III, p. 127).

Analysis

1. Deliberate Indifference

> Having incarcerated persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct, having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course. Prison conditions may be restrictive and even harsh, but gratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objectiv[e], any more than it squares with evolving standards of decency. Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society.

Farmer v. Brennan, 511 U.S. 825, 833 (1994).

In accordance with the aforestated rationale, the Supreme Court has found that in situations such as the one at bar, involving a threat of inmate-on-inmate violence, a prison official's "deliberate indifference" to a substantial risk of serious harm to an inmate violates the Eighth Amendment's prohibition against "cruel and unusual punishment. *Id.; see also Little v. Walker*, 552 F.2d 193 (7th Cir. 1977).

Under the "deliberate indifference" standard, a prison official may be held liable under the Eighth Amendment only if he knows that an inmate faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it; "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 847. A plaintiff must satisfy both the objective (substantial risk of serious harm) and the subjective (knowing disregard) components of the test. *Farmer*, 511 U.S. at 834. This standard is the equivalent of recklessness in the criminal law sense. *Id.* At 837.

> [A]n Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. . . . Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.

Id., 511 U.S. at 842 (internal citations omitted).

> That a trier of fact may infer knowledge from the obvious, in other words, does not mean that it must do so. Prison officials charged with deliberate indifference might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.
>
> In addition, prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure "reasonable safety."

Id, at 844.

According to plaintiff, when defendant Rausch arrived with plaintiff's new cellmate, inmate Garcia, he told defendant that he "fear[ed] for his life" because the Latin Kings had a "hit" on him, that Garcia was a Latin King, and that Lt. Alemond had agreed earlier that plaintiff would not be celled with Garcia. (Tr. I, pp. 73-75). At that point in time, based solely on what plaintiff told him, from an objective perspective, there was a substantial risk of serious harm to plaintiff if he and Garcia were celled together. Knowingly housing inmates who are enemies together is plainly dangerous, and a guard who is alerted to such a risk should tread cautiously. However, defendant would also factor-in that, when plaintiff and Garcia were jointly asked whether there was a problem, plaintiff indicated that he did not have a problem with Garcia (Tr. I, p. 75) – leaving defendant to guess which was true.

Rausch himself, hypothetically, conceded the unreasonableness of questioning the inmates together about the nature of "the problem." (Tr. III, pp. 79-80). The jury must have accepted plaintiff's explanation that when asked if he had a problem with Garcia, feeling like he was "on the hot seat," he did not have a choice, so he shook his head in the negative. (Tr. I, p. 75). Consequently, the jury must have discounted plaintiff's "statement" that he did not have a problem with Garcia. Given that plaintiff had just moments before alerted defendant Rausch that Garcia was a threat, and that Rausch had indicated that plaintiff either could not refuse Garcia as a cellmate, or that segregation was full and there were no alternate cells available (*see* Tr. III, pp. 74-77), the jury may have perceived that Rausch's inquiring whether the inmates had a problem with each other as more akin to a statement, rather than a question. Regardless of what Rausch concluded, taking the totality of the circumstances and the information conveyed to Rausch, this Court finds that, from an objective perspective, at the time Rausch made the decision to cell Garcia with plaintiff, there was a substantial risk of serious harm to plaintiff. *See Farmer*, 511 U.S. at 844. The scenario defendant Rausch faced has "DANGER – PROCEED WITH CAUTION" written all over it.

Rausch inferred from the fact that he ultimately celled plaintiff and Garcia together that he must not have perceived a serious threat; in addition, Rausch stresses that he made an effort to assess the seriousness of the situation, and plaintiff communicated that he did not have a problem with Garcia. Nevertheless, the jury *may* infer that Rausch knew of the substantial risk from the very fact that the risk was obvious – which the jury apparently

did. *Farmer*, 511 U.S. at 842 and 844. Rausch need not have specifically desired that harm befall plaintiff. *Farmer*, 511 U.S. at 842.

Mere obviousness is not conclusive; if it were, the subjective recklessness aspect of deliberate indifference would lose all meaning. However, in this case, there is ample evidence from which to conclude that Rausch's attempt to ascertain the seriousness of the threat was merely pretense, and that because he did not want to go to the extra effort to find different accommodations for Garcia, he recklessly disregarded what he knew to be a dangerous situation. That decision to essentially disregard the threat is where liability lies. *Farmer*, 511 U.S. at 839-840. A jury could have reasonably inferred that Rausch crossed the line from gross negligence to deliberate indifference based on the ludicrousness of "asking" each inmate if he had a problem with the other. Credibility had to have been key to the jury's analysis, this Court cannot interject its own credibility determinations; and if it could, having observed both parties' testimony, it very well may have reached the same conclusion as the jury.

Defendant Rausch highlights that he did *something* – he brought the inmates together and asked them if they had a problem with each other. However, a prison official will only be freed from liability if he responded *reasonably* to the risk. *Farmer*, 511 U.S. at 844. As mentioned above, Rausch's method of questioning could be perceived as deliberately forcing plaintiff to make a Hobson's choice. This Court does not perceive how deliberately forcing plaintiff to make a true Hobson's choice can be deemed a reasonable response, particularly if plaintiff's testimony that Rausch told him he could not be moved to a different

cell is believed. Again, credibility is the linchpin of liability.

2. Causation

It is undisputed that during the 48 hour period between May 28th when defendant Rausch celled plaintiff and Garcia together, and when plaintiff was sexually assaulted by Garcia on May 30th, plaintiff had contact with multiple prison officials, all of whom could have offered plaintiff sanctuary. It is also undisputed that the Placement Office has the final say in cell assignments, and that it is standard operating procedure for the Placement Office to review all after-hour cell assignments the next day. Defendant argues that plaintiff's failure to ask others readily available for sanctuary, and the Placement Office's allowing plaintiff and Garcia to remain celled together break the causal chain and relieve him of any liability.

With regard to plaintiff's failure to seek sanctuary, he explains that he believed Lt. Rausch's assertion that he could not be moved, that there were no other housing options. In contrast, defendant notes that plaintiff was aware of his right to refuse housing at any time because that was how he had ended up in the cell he was in. However, plaintiff implies that having refused housing so that he was in a protective assignment, he could not refuse another assignment.

Insofar as the Placement Office was to review all after-hours cell assignments, plaintiff notes that there was no evidence that such a review ever occurred, implying that there was insufficient evidence to establish a break in the causal chain.

"'A section 1983 action is a tort damage action even though the duty the defendant is alleged to have breached is created by the Constitution or federal law.' As a common law tort action, the plaintiff in a civil rights tort action bears the burden of establishing that the defendant owed the plaintiff a duty, that the defendant breached his duties to the plaintiff, and that this breach caused the plaintiff actual damages.'" *Muckway v. Craft*, 789 F.2d 517, 521 (7th Cir. 1986) (quoting *Garza v. Henderson*, 779 F.2d 390, 395 (7th Cir. 1985)). "The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or should reasonably have known would cause others to deprive the plaintiff of [his] constitutional rights." *Conner v. Reinhard*, 847 F.2d 384, 397 (7th Cir. 1988) (citations omitted). The causal chain may be broken, but "[t]he intervention of independent, concurrent or intervening forces will not break the causal connection if the intervention of each independent force was itself probable and foreseeable." *Hylin v. U.S.*, 715 F.2d 1206, 1216 (7th Cir. 1983).

Causation and intervening causation are questions of fact, and as such may rise and fall on credibility determinations. In this situation, if the jury believed that it was reasonable for plaintiff to have believed defendant Rausch when he indicated plaintiff could not refuse a cell assignment in the situation he was in, or that there was no other option because of a shortage of open cells, then it would follow that plaintiff did not see that he had any other options to seek sanctuary. In that plaintiff had asked correctional lieutenant – Rausch – for help, and having not been helped, it is neither unreasonable, nor unforeseeable to conclude that no help is available.

The fact that the Placement Office should have or could have reassigned Garcia does not break the causal chain. As plaintiff correctly notes, there was no evidence that the Placement Officer ever reviewed Garcia's cell assignment. There is also no evidence that plaintiff's specific fear of Garcia was ever relayed to the Placement Office. Furthermore, a prison policy that the Placement Office should review all after-hours cell assignments does not create an intervening constitutional obligation that would break the causal chain.

3. Qualified Immunity

Qualified immunity generally shields government officials performing discretionary functions from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known. *Baxter v. Vigo County School Corp.*, 26 F.3d 728, 737 (7th Cir. 1994). The plaintiff bears the burden of establishing the existence of a clearly established constitutional right in relation to the specific facts confronting the public official when he acted. *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir. 1988). Thus, an official is personally liable for his or her unlawful actions if, "assessed in light of the legal rules that were clearly established at the time it was taken," those actions were legally and objectively unreasonable. *May v. Sheahan*, 226 F.3d 876, 881 (7th Cir. 2000) (quoting *Wilson v. Layne*, 526 U.S. 603, 614 (1999)).

Defendant Rausch argues that he took some action, thereby satisfying his obligations under *Farmer v. Brennan*, 511 U.S. 825 (1994), and *Duane v. Lane*, 959 F.2d 673 (7th Cir. 1992). However, as fully explained above,

defendant is legally incorrect. "[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded *reasonably* to the risk, even if the harm ultimately was not averted. *Farmer*, 511 U.S. at 844. If the action taken was unreasonable, as it appears to be in this case, then the official may be found liable.

4. The Award

The jury awarded plaintiff $1.5 million, which defendant argues is grossly, even monstrously, excessive, "given the lack of evidence of causation, the contradicted nature of the emotional injury and awards in similar cases." The defendant cites numerous prisoner sexual assault cases and smattering of non-prisoner sexual assault cases, all of which involved awards more than $1 million less than what plaintiff was awarded. In contrast, plaintiff cites a passel non-prisoner sexual assault cases where the awards were millions of dollars more than what plaintiff received.

A jury award of damages may be set aside only if it is grossly excessive. *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1424 (7th Cir. 1986). "There is no precise or exact measuring stick for calculating general damages for pain and suffering. Although the jury should not pick a figure out of the air, exact compensation for pain and suffering is impossible." *Butler v. Dowd*, 979 F.2d 661, 671 (7th Cir. 1992). In evaluating whether an award is grossly excessive, a detailed appraisal of the evidence bearing on damages is essential. *Grunenthal v. Long Island Railroad Co.*, 393 U.S. 156, 159 (1968). However, insofar as the award hinges upon credibility determinations about the evidence, the jury's conclusions are viewed deferentially,

as the jury had the benefit of hearing the testimony, observing the demeanor of the witnesses, and it reflects community standards. *See Butler*, 979 F.2d at 671.

Aside from plaintiff's own testimony about the traumatizing and debilitating effects of Garcia's attack, the jury received evidence from several mental health professions connected with the Illinois Department of Corrections. Two psychologists, Drs. Suh and Kalicak, concluded that plaintiff suffered from an adjustment disorder; Dr. Kalicak specifically diagnosed Post Traumatic Stress Disorder, which was deemed in remission as of March 2001. Dr. Kozubal found that plaintiff suffered from a narcissistic personality disorder, but upon learning that plaintiff had been sexually assaulted before, Dr. Kozubal left open the possibility of PTSD. (Vol. II, pp. 188-189). Prison social worker Blomquist agreed that plaintiff was narcissistic, but he could not rule out PTSD, as symptoms currently persisted. Plaintiff's retained psychologist, Dr. Fletcher, testified that, after a battery of tests, he concluded that, with a reasonable degree of medical certainty, plaintiff suffers from PTSD, which may improve with time and treatment. Dr. Fletcher further opined that he considered the second sexual assault by Garcia to be the tipping point for plaintiff's mental health.

A tortfeasor must take his plaintiff as he finds him, although he cannot be held liable for the aggravation of a pre-existing condition if there is no causal link. *See generally Reed v. Union Pacific R. Co.*, 185 F.3d 712, 717 (7th Cir. 1999). Dr. Fletcher's opinion that the second sexual assault was what caused plaintiff's fragile mental state to break supports what could have been inferred from plaintiff's own testimony and the chronology of events.

The wide range of awards cited by the parties illustrate how fact-specific such awards are. Insofar as the $1.5 million award falls more in line with awards in non-prisoner sexual assault cases, this Court must stress that prisoners have the same worth and are equal in the eyes of the law to non-prisoners. *See generally Kerr v. City of Chicago*, 424 F.2d 1134, 1138 (7th Cir. 1970). In this case, the $1.5 million award is within the realm of awards in other sexual assault cases. Again, because such awards are so fact-specific, and a reflection of credibility determinations, this Court is loathe to deem this award grossly excessive. Plaintiff's fragile status before being attacked by Garcia, and the particular facts provide a reasonable basis for why this award is higher than some others. Similarly, the award may have reasonably been even higher, except for testimony indicating that plaintiff's functioning had improved. The Court does not perceive that it is a denial of justice to let the award stand.

IT IS THEREFORE ORDERED that, for the aforestated reasons, defendant Rausch's motion seeking judgment as a matter of law and/or a new trial (Doc. 56) is DENIED in all respects; judgment in favor of plaintiff Riccardo and the award of $1.5 million shall stand.

IT IS SO ORDERED.

DATED: March 7, 2002

/s/ Clifford J. Proud
CLIFFORD J. PROUD
U.S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Anthony Riccardo,	)	
	)	
Plaintiff,	)	**NO. 99-372-CJP**
-vs-	)	
Lieutenant Larry Rausch,	)	
	)	
Defendants.	)	

JUDGMENT IN A CIVIL CASE

(Filed Apr. 12, 2001)

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff **ANTHONY RICCARDO** and against defendant **LIEUTENANT LARRY RAUSCH** in the amount of one million five hundred thousand dollars ($1,500,000.00) in accordance with jury verdict filed April 11, 2000.

DATED this 11th day of April, 2001.

NORBERT G. JAWORSKI, CLERK

BY: /s/ [Illegible]
Deputy Clerk

Approved by Clifford J. Proud
United States Magistrate Judge
Clifford J. Proud

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ANTHONY RICCARDO,	)	
	)	
Plaintiff,	)	**CIVIL NO. 99-372-GPM**
vs.	)	
LARRY RAUSCH, Lieutenant,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

(Filed Mar. 27, 2000)

MURPHY, District Judge:

This matter is before the Court on the Report and Recommendation of Magistrate Judge Proud dated January 20, 2000 (Doc. 22), which recommends that Defendant's motion to dismiss (Doc. 7) be denied. Defendant received the Report and Recommendation on January 31, 2000, and filed an objection thereto on February 10, 2000 (Doc. 23).

Timely objections to the Report and Recommendation having been filed, the Court has undertaken a *de novo* review of the entire record in this case as required by 28 U.S.C. § 636(b)(1), Federal Rule of Civil Procedure 72(b), and Southern District of Illinois Local Rule 73.1(b). In undertaking this *de novo* review, the Court has looked at all of the evidence contained in the record and has given "fresh consideration to those issues to which specific objection has been made by a party." H.R.REP.NO. 94-1609, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6163 (defining "*de novo* determination" for purposes of

28 U.S.C. § 636(b)(1)); *see also United States v. Raddatz*, 447 U.S. 667, 675-76 (1980) (district court must make *de novo* determination regarding those parts of magistrate judge's report to which any party objects, but *de novo* hearing is not required).

Having undertaken a *de novo* review of the entire record in this case, the Court agrees with the Report and Recommendation that Defendant's motion to dismiss this action by reason of Plaintiff's alleged failure to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a) should be denied. The record shows that the incident giving rise to this action occurred on May 30, 1997, when Plaintiff was assaulted while incarcerated at Centralia Correctional Center. Plaintiff filed a grievance in connection with this incident on February 11, 1998, while incarcerated at Sheridan Correctional Center. Plaintiff's grievance was untimely because not filed within six months after the incident giving rise thereto. *See* 20 ILL. ADMIN. CODE § 504.810(a). However, Plaintiff's grievance was not denied as untimely by the grievance officer, who instead sent the grievance to the Administrative Review Board (ARB) on February 23, 1998 (*see* Doc. 18, Ex. 2). On March 5, 1998, Plaintiff appealed the Chief Administrative Officer's decision on his grievance to the Director of the Illinois Department of Corrections (IDOC) via the ARB (*see* Doc. 18, Ex. 2). Thereafter, it is unclear what action, if any, the IDOC took on Plaintiff's grievance. On May 27, 1999, Plaintiff filed the instant action pursuant to 42 U.S.C. § 1983, alleging in connection with the assault at Centralia Correctional Center that Defendant, a corrections officer at Centralia, failed to protect him from serious physical harm in violation of the Eighth Amendment.

It is the Court's view that Plaintiff sought to pursue administrative remedies, but the IDOC simply "dropped the ball" in processing his grievance. While it may be that, as Defendant states in his objection, the ARB would have denied Plaintiff's grievance as untimely, it appears that the ARB took no action of any kind on the grievance. The Court sees no reason why this procedural default should be laid to Plaintiff's account. Accordingly, the Court hereby **ADOPTS** the Report and Recommendation (Doc. 22), so that Defendant's motion to dismiss (Doc. 7) is **DENIED**.

IT IS SO ORDERED.

DATED: **03/27/00**

/s/ [Illegible]
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ANTHONY RICCARDO,	)	
Plaintiff,	)	
	)	**Civil No.**
v.	)	**99-372-GPM**
LIEUTENANT LARRY RAUSCH,	)	
Defendant.	)	

REPORT AND RECOMMENDATION

(Filed Jan. 20, 2000)

PROUD, Magistrate Judge:

This matter was recommitted to the undersigned for a determination as to whether plaintiff was a prisoner when this action commenced and, if so, whether plaintiff exhausted his administrative remedies as required by 42 U.S.C. 1997e[1]. This Report and Recommendation is respectfully submitted to United States District Judge G. Patrick Murphy pursuant to 28 U.S.C. § 636(b)(1)(B) and (C). Before the Court is defendant's Motion to Dismiss and supporting memorandum and plaintiff's response thereto and Court ordered responses by plaintiff and defendant (Docs. 7, 8, 9, 18, 19).

[1] 42 U.S.C. §1997e(a) is also referenced as Section 803(d) of the PLRA of 1996 (Title VII of Pub.L. 104-134, 110 Stat. 1321 (effective April 26, 1996)).

Procedural History

On May 27, 1999, plaintiff filed the above-captioned civil rights suit, pursuant to 42 U.S.C. § 1983, alleging that while he was incarcerated at Centralia Correctional Center defendant Rausch failed to protect him from serious harm in violation of the Eighth Amendment. (Doc. 1). More specifically, plaintiff claims that, over his objections, Rausch placed plaintiff in a cell with gang member Garcia, who had a hit on plaintiff. Subsequently, Garcia shaved plaintiff's head and sexually assaulted plaintiff. Plaintiff seeks monetary damages. (Doc. 1, p. 3).

Plaintiff was incarcerated at Centralia Correctional Center from November 21, 1996, through June 24, 1997, when he was transferred to Sheridan Correctional Center. On February 11, 1998, plaintiff filed a grievance complaining of the alleged May 30, 1997, assault. The Counselor's Response dated February 23, 1998, is as follows: "Incident occurred in Cook Co. and Centralia CC grievance be sent to ARB." *Doc. 18, Pl.'s Ex. 2.* Plaintiff appealed to the Administrative Review Board on March 5, 1998. *Doc. 18, Pl.'s Ex. 2.* Plaintiff was paroled on March 16, 1998. Plaintiff was then held at Cook County Jail from April 17, 1998, to October 8, 1999. He filed the present complaint while being held at Cook County Jail.

Analysis

It is now clear that at the time the complaint was filed plaintiff was a prisoner confined in a jail. "Prisoner" is defined as any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial

release, or diversionary program. 42 U.S.C. §1997e(h). Pursuant to 42 U.S.C. §1997e(a), "No action shall be brought with respect to prison conditions under section 1983 . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Exhaustion of administrative remedies is required before a case may be brought, even if exhaustion is accomplished during pendency of the case. *See* 42 U.S.C. § 1997e(a); and *Perez*, 182 F.3d at 534-37. Exhaustion of administrative remedies pursuant to 42 U.S.C. § 1997e(a), while not jurisdictional per se, is a "precondition" to suit, regardless of the apparent futility of pursuing an administrative remedy, regardless of whether money damages are sought as a tangential remedy and regardless of notions of judicial economy. *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532 (7th Cir. 1999). Defendant moves to dismiss this cause on the basis that plaintiff failed to exhaust his administrative remedies. Defendant provides to the Court an affidavit stating that a search of the Administrative Review Board's records for plaintiff indicate that plaintiff did not file a grievance. However, plaintiff provided to the Court a grievance which indicates that plaintiff initiated administrative remedies. Plaintiff further responds that the exhaustion requirement is inapplicable because the sexual assault complained of is already complete and no remedies are available through the administrative process.

The Illinois Department of Corrections (IDOC) has adopted a grievance procedure for inmates whereby an inmate first takes his complaint to a correctional counselor, if this does not resolve the problem, he is to file a written grievance on an institutional form within six

months of the incident or occurrence complained of. If a committed person can demonstrate that a grievance was not timely filed for good cause, the grievance shall be considered. Each institution has one or more designated grievance officers who review such grievances. The grievance officer reports his or her findings and recommendations to the chief administrative officer, i.e., the warden, within fifteen days, "whenever possible," and the warden is to advise the inmate of his or her decision within ten days after receipt of the grievance officer's report. In an emergency, an inmate may send his grievance directly to the warden. If the warden determines that there is a substantial risk of imminent personal injury to the inmate, the grievance is to be decided within three days.

The inmate may appeal the warden's disposition of the grievance in writing to the director of the Department of Corrections within 30 days of the warden's decision. The director reviews the grievance and the responses of the grievance officer and warden, and determines whether the grievance requires a hearing before the Administrative Review Board. If it is determined that the grievance is meritless or can be resolved without a hearing, the inmate is to be advised of this disposition within 30 working days of receipt of the grievance. Otherwise, the grievance is referred to the Administrative Review Board, which may hold hearings and examine witnesses. The Board is supposed to submit a written report of its findings and recommendations to the director of the Department of Corrections within 30 working days of receipt of the grievance, "whenever possible"; presumably within 30 working days of the Board's receipt of the grievance, not the director's. The director then has ten days to make a final determination, again "whenever possible." 20 Ill.Adm.Code § 504.810-850 (1992).

Plaintiff did not timely file his grievance. However, the grievance officer did not reject the grievance as untimely but indicated that the grievance was to be sent to the Administrative Review Board. The grievance form indicates that on March 5, 1998, plaintiff appealed the decision to the Director, following the appropriate grievance process. The Court was not provided with a response form the Director, however, the Court notes that the time for a response and final determination from the director has long passed. Based on the information before the Court plaintiff has availed himself of the administrative remedies available and has exhausted same.

The Court further notes that both plaintiff and defendant provided to the Court information regarding administrative remedies available to the plaintiff while he was held at Cook County Jail. The Court will not consider those options since plaintiff provided to the Court evidence of exhaustion while in state prison custody.

Recommendation

IT IS THEREFORE RECOMMENDED, based on the foregoing analysis, that defendant's Motion to Dismiss (Doc. 7) be DENIED.

SUBMITTED this 20th day of January, 2000.

/s/ Clifford J. Proud
CLIFFORD J. PROUD
UNITED STATES MAGISTRATE JUDGE

(2)

Supreme Court, U.S.
FILED
JAN 14 2005
OFFICE OF THE CLERK

No. 04-510

In the Supreme Court of the United States

ANTHONY RICCARDO, PETITIONER,

v.

LARRY RAUSCH, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit's fact-bound holding – that no reasonable jury could find that respondent Lt. Larry Rausch subjectively believed that placing Garcia in petitioner Anthony Riccardo's cell on May 28 posed a substantial risk that Garcia would fulfill his personal fantasies on May 30 by sexually assaulting petitioner – is consistent with *Farmer v. Brennan*, 511 U.S. 825 (1994), and Rule 50 of the Federal Rules of Civil Procedure, in light of evidence that respondent knew that (a) petitioner shook his head when asked if he "had a problem" with Garcia, after initially having said he feared Garcia would effect a retaliatory Latin King "hit"; (b) Garcia had no history of violence; (c) Garcia himself had asked for protection from the Latin Kings; (d) the prison's Placement Office was responsible for reviewing respondent's celling decision the next morning; and (e) petitioner would have multiple opportunities thereafter to object to being celled with Garcia.

2. Whether, irrespective of the merits of the questions presented by the petition, petitioner still would not be entitled to judgment given that (a) petitioner's suit was foreclosed under the Prison Litigation Reform Act due to his failure to file a grievance that alerted prison officials about the (alleged) possibility that respondent could have prevented the assault; and (b) respondent was entitled to qualified immunity.

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BRIEF IN OPPOSITION

After petitioner Anthony Riccardo told Respondent Lt. Larry Rausch that he feared a retaliatory "hit" by the Latin Kings, respondent celled petitioner with Garcia, a Latin King who himself had sought protection from the Latin Kings and had no history of violence. Two days later, Garcia sexually assaulted petitioner to fulfill a personal fantasy. Petitioner filed suit, claiming that respondent violated his Eighth Amendment rights, and a jury found in petitioner's favor. The Seventh Circuit reversed, holding that the evidence was legally insufficient to establish either an objective, significant risk of harm or respondent's subjective knowledge of such a risk.

This case presents no unsettled, important question of federal law and no cognizable split among the circuits. Instead, it concerns only the Seventh Circuit's straightforward application (to the particular facts of petitioner's case) of familiar and well-settled principles governing Eighth Amendment claims and the standard for determining whether evidence is legally sufficient.

Even if petitioner were correct on the merits of the question(s) presented, he still would not be entitled to judgment for two independent reasons. First, the case should have been dismissed due to petitioner's failure to comply with the Prison Litigation Reform Act. Second, respondent was entitled to qualified immunity. For these reasons, this Court should deny the petition.

STATEMENT

A. Before "double celling" inmates in 1997 at Centralia Correctional Center, a segregation lieutenant had to determine as best he could whether the inmates were suitable. Tr. I at 28, 35. At that time, the segregation lieutenant on the evening shift did not have access to the information used to determine

suitability. *Id.* at 36, 42. Respondent knew that a cell transfer during the evening shift would be reviewed for suitability the following morning by Centralia's Placement Office, which was solely responsible for the movement of all inmates and had the final say on cell assignments. Tr. III at 71-72, I at 41. He also knew that inmates may complain about cellmates at any time. Tr. I at 47, III at 81.

Respondent has moved inmates from one cell to another hundreds of times. Tr. III at 68-69. When he received a complaint of a problem with a cellmate, which was common, he routinely would discuss the problem to find out what it was and then make further inquiries to assess the sincerity of a housing refusal. Tr. III at 69-70. An inmate who refused housing was moved to segregation for having committed a disciplinary violation, so the procedure was "a little bit more involved" if the inmate already was in segregation. Tr. III at 75-77. If an investigation revealed that the inmate had no legitimate basis for refusing housing, he would be disciplined. Tr. I at 43-45. If the inmate initially refused housing but then changed his mind, however, respondent would not view him as having refused housing, and the inmate would not be moved. Tr. III at 80.

B. Petitioner was incarcerated in 1996 for stalking his former girlfriend. Tr. I at 58, 62. After receiving a disciplinary "ticket" in April 1997 at Centralia, he was placed in segregation. Tr. I at 62-64. On May 21, petitioner was taken to the receiving cells to await a cell assignment in the general population, but while he was there, some of his personal property was stolen. *Id.* He suspected his segregation cellmate, a member of the Latin Kings, who refused to return the property and then threatened petitioner for saying he would report the theft. *Id.* at 65-67. Petitioner subsequently reported the theft to a guard and then refused to be returned to the general population because he wanted to get away from the Latin Kings

after the other inmates saw him make the report. *Id.* at 67-68. Petitioner also filed a grievance about the stolen property. Pl. Ex. 6.

During the day shift on May 28, another inmate introduced petitioner to Juan Garcia, a Latin King who was said to be able to help petitioner recover his property. Tr. I at 69-70. Upon returning from the yard, petitioner told Lt. Alemond that Garcia was going to try to get into his cell and he did not want Garcia there. *Id.* at 72. When petitioner said he feared for his life, Lt. Alemond replied that he would take care of it. *Id.*

At some time before the evening of May 28, petitioner's cellmate refused to be housed with him and was moved. *Id.* at 29.

Respondent was the lieutenant in charge of the segregation and receiving units on the evening shift that day. *Id.* at 26. Petitioner did not mention Garcia to respondent. Tr. II at 30.

At around 9:25 p.m. that evening, respondent came to petitioner's cell with Garcia, who was being placed in enemy protection because he claimed to have enemies among the Latin Kings. Tr. I at 73-74, III at 55, 57. Petitioner agreed to respondent's request to help Garcia bring his property into the cell. Tr. I. at 74. Outside the cell in the day room, petitioner pulled respondent aside and said that Garcia was a Latin King, explaining that he feared for his life due to retaliation by the Latin Kings. Tr. I at 74-75, II at 30, 35. Respondent replied that petitioner had no right to refuse housing while in segregation and that there was no room to move him anywhere else. Tr. II at 30-31.

Respondent then took petitioner back to the cell and asked Garcia if he had a problem with petitioner. Tr. I at 75-76. Garcia said no. *Id.* When respondent asked petitioner if he had

a problem with Garcia, petitioner shook his head and said nothing. *Id.*

Respondent did not see petitioner again, and at trial, he did not recall taking Garcia to petitioner's cell. Tr. III at 68, 72.

C. Over the next two days, May 29 and May 30, Garcia was acting crazy and threatening petitioner, but petitioner did not leave the cell when the door was opened for meal deliveries and removals, and he did not inform the prison staff who came by his cell each day that he did not want Garcia there.[1] Tr. II at 35-36, 40. On May 29, Garcia said he would get the Latin King "hit" removed and try to recover some of petitioner's stolen property if petitioner paid Garcia's telephone bill. Tr. I at 77, Pl. Ex. 8. The next morning, petitioner wrote two grievances, neither of which said he feared Garcia. Def. Ex. 13A, 13B. One was about health care, and the other identified the Latin Kings who had taken his property and complained about the lack of assistance in getting it back. *Id.*

The afternoon of May 30, petitioner accepted Garcia's offer to cut his hair with a razor even though Garcia was "talking crazy . . . about his brother dying and all this other stuff, and how he had these fantasies . . . ." Tr. I at 80-81, II at 45-46. After ripping a chunk of hair from the center of petitioner's head, Garcia began to shave petitioner's head. Tr. I at 81. A correctional officer came by the cell and asked repeatedly if petitioner needed to go to the health care unit because he was "bleeding pretty bad." Tr. I at 81-82, II at 46-47. When petitioner replied, "whatever you think, Officer," the correctional officer left. Tr. I at 82, II at 47.

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[1] In segregation, correctional staff come around mainly to remove trash and deliver three meals, opening the cell doors and placing the trays into each inmate's hands. Tr. II 35, 47, 33. In addition, on each shift, medical staff tour the area. Tr. I at 47.

After dinner trays were removed, Garcia again talked about his brother and how he had to "fulfill this fantasy." Tr. II at 49. After petitioner refused to have anal sex, Garcia ejaculated onto petitioner's feet. Tr. I at 83-84. Garcia then had petitioner perform fellatio, though Garcia did not ejaculate. Tr. I at 84, III at 54. When a correctional officer came by about fifteen minutes later to ask if either inmate wanted ice, petitioner ran out of the cell. Tr. I at 84, II at 52.

Approximately nine months later, in February 1998, petitioner filed a grievance, describing Garcia's attack and stating "I blame myself for this, since the Administration don't do there jobs. This should never happen again. . . . My family and I wish to prosecute to the fullest. . . . If someone outside decided to rape a person they would've broken the law and [been] brought in front of a judge. . . . The law should still be upholded regardless of where [a violation] takes place." Def. Ex. 20. As the "Relief Requested," petitioner asked that "this anima . . . face a judge and jury" and complained that the discipline Garcia had been given for the assault was "not enough." *Id.* The grievance did not mention the guards generally or respondent in particular. *Id.* At trial, petitioner testified that the grievance had nothing to do with respondent putting Garcia in the cell and that its sole purpose was to have criminal charges filed against Garcia. Tr. III at 65-66.

D. Approximately two years after the incident, petitioner filed a complaint alleging that respondent had violated his Eighth Amendment rights. Doc. 1. Respondent moved to dismiss the complaint for failure to timely exhaust his administrative remedies under the Prison Litigation Reform Act (42 U.S.C. § 1997e(a)). Doc. 7. The district court denied the motion due to the lack of evidence that prison officials had taken any action on the grievance. Pet. App. 54. Respondent answered the complaint, raising the defense of qualified immunity. Doc. 26. The matter proceeded to trial, and the jury

returned a verdict for petitioner, awarding him $1,500,000 in compensatory damages. Doc. 53. Respondent filed a motion for judgment as a matter of law or, alternatively, a new trial (Docs. 56, 58), which was denied (Pet. App. 30). Respondent appealed. Doc. 65.

E. The Seventh Circuit reversed, with a dissent. 359 F.3d 510 (7th Cir. 2004). Upon denying respondent's petition for rehearing and suggestions for rehearing en banc, from which four judges dissented, the court issued an amended opinion. Pet. App. 1.

In the amended opinion, the court first held that petitioner had satisfied the PLRA. Pet. App. 2-4. Characterizing the grievance as "ambiguous" and "at the border of intelligibility," and finding it "hard to imagine much less that a prisoner could do and still alert the prison" to the nature of the wrong for which petitioner was seeking redress, the court nevertheless held that the grievance was sufficient for PLRA purposes. *Ibid.* The court viewed it as "hint[ing] at problems in prison administration," which therefore "should have considered" it a request to reduce sexual assaults in general, either by taking better steps beforehand to separate potential victims from potential aggressors or by imposing harsher penalties afterward as a deterrence method. *Ibid.* According to the court, "[a] generous construction of this grievance would have induced the prison to consider the possibility that the guards could have prevented this assault." *Ibid.*

Turning to the merits, the court observed that the objective and subjective components of an Eighth Amendment claim (a "substantial risk of serious harm" and a defendant's appreciation of the existence of that risk, respectively) "are for the jury in the first instance, with appellate review limited to the question whether any reasonable juror could have found that the requisite level of risk existed, and that Rausch knew it." Pet. App. 7. Stressing that under *Farmer v. Brennan*, 511 U.S. 825, 837

(1994), "'deliberate indifference' means substantial awareness," it observed that guards need not believe every prisoner's every statement. Pet. App. 6. As the court reasoned, guards have the difficult task of discriminating, within a short period of time and with little hard information, between feigned or imagined risks of harm and real ones. *Ibid.* The court stressed that guards may not be held liable even if they were negligent. *Ibid.* Instead, quoting *Farmer*, the court emphasized that the guard must be "both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Ibid.*

The court did not reach the issue of qualified immunity, holding that the evidence was legally insufficient. Pet. App. 7. In doing so, it held that the district court's finding that a guard cannot benefit from immunity if he did not reasonably respond to a risk actually foreseen, which "merged immunity and the merits," was incompatible with *Saucier v. Katz*, 533 U.S. 194, 203-06 (2001). Pet. App. 7.

The court then concluded that, as a matter of law, petitioner had presented insufficient evidence to support a finding on the objective element of his Eighth Amendment claim, that is, a substantial risk of the retaliatory Latin King "hit" petitioner told respondent he feared from Garcia. Pet. App. 7-8. It found significant that petitioner had presented no evidence connecting his fear of a Latin King retaliatory "hit" to the sexual assault, pointing to the evidence that Garcia was acting to fulfill a personal fantasy when he sexually assaulted petitioner and the lack of evidence that Garcia was acting for the Latin Kings. Pet. App. 8. On this record, the court held, "the (objectively evaluated) risk to [petitioner] of sharing a cell with Garcia was no greater than the risk of sharing a cell with any other prisoner." *Ibid.* In doing so, the court likened respondent to a bus company that knowingly hires a driver with a bad drinking record who later has an accident unrelated to his drinking,

explaining that the company could not be held liable because its negligence in hiring the driver did not create or increase the risk of that particular accident. *Ibid.*

On the subjective element of petitioner's claim, *i.e.*, deliberate indifference, the court held that from the evidence at trial, no reasonable jury could have concluded that respondent subjectively appreciated that celling Garcia with petitioner would expose him to a substantial risk of serious harm. Pet. App. 8-12. The court rejected petitioner's argument that respondent "should have believed"petitioner's initial assertion of mortal fear, stressing that *Farmer* requires evidence of what a defendant "*did* believe." *Id.* at 8-9 (emphasis in original). Emphasizing that the Eighth Amendment does not require guards to believe everything an inmate says, the court held that respondent's conduct was a reasonable response under the circumstances because he knew (1) petitioner contradicted his initial statement by denying he "had a problem" with Garcia; (2) Garcia himself had requested protection from the Latin Kings; (3) Garcia had no known history of violence (sexual or otherwise); and (4) the Placement Office would review Garcia's celling assignment the next morning. *Id.* at 9-10. The court further held that on this record, petitioner was entitled to believe that his celling decision would be reviewed the next morning by the Placement Office, and that petitioner could voice his objection to Garcia's presence the next day if he were truly in mortal fear. *Id.* at 10-11.

The court then allayed concerns about how an inmate can demonstrate the objective and subjective prongs of an Eighth Amendment claim when, as here, his attacker has a "clean" record. Pet. App. 10-11. As an example of evidence showing an actual, objective risk of harm, the court stated, an inmate could present evidence of a strong correlation between prisoners' professions of fear and actual violence, such as data about how many requests for protection are dishonored and, if

so, how often this results in violence. Pet. App. 10. The court added that to demonstrate that a guard "must" understand the risk an inmate faces when a protest is disregarded, an inmate may present evidence that violence was common at his prison and that inmates had good track records in identifying potential aggressors. *Ibid.*

In closing, the court stressed that *Farmer* allows guards to exercise independent judgment and make honest mistakes, cautioning that the Eighth Amendment does not require a guard to assume that an inmate's report of potential harm is both honest and accurate. Pet. App. 12.

Judge Williams agreed with the majority that petitioner had satisfied the PLRA, but she dissented on the merits, on the ground that the record contained ample evidence to sustain the verdict. Pet. App. 12-21. She also wrote a dissent from the denial of rehearing en banc, joined by Judges Ripple, Rovner, and Wood. Pet. App. 27-29. Judge Ripple too dissented from the denial of rehearing en banc, joined by Judges Rovner, Wood, and Williams, on the ground that the evidence in favor of petitioner was not legally insufficient. Pet. App. 22-27.

REASONS FOR DENYING THE PETITION

Even if there were an inter-circuit conflict concerning the evidence required to establish the subjective component of an Eighth Amendment "failure to protect" case (and there is none), at least two other independent grounds exist for affirming the judgment against petitioner. As a threshold matter, this case should have been dismissed long before trial because petitioner's grievance failed to comply with the PLRA by containing enough information to alert prison officials that he wanted them to consider whether respondent could have prevented the assault. Another reason for affirmance is that respondent was entitled to qualified immunity in light of the existing case law and the disagreement among the judges of the

Seventh Circuit on denial of rehearing en banc about whether respondent was deliberately indifferent. Thus, because reversal on the questions presented would not affect the judgment, the Seventh Circuit's opinion presents an exceptionally poor candidate for this Court's review.

Even if the merits of the questions presented by petitioner are considered, they do not warrant this Court's attention. Rather than presenting an important federal question on which a conflict exists, petitioner misinterprets and overstates the Seventh Circuit's opinion and his authorities. The Seventh Circuit's decision breaks no new ground. It held only that the evidence presented at trial was legally insufficient on both the objective and subjective components of petitioner's Eighth Amendment claim. Though petitioner contends that this Court's review is warranted because the Seventh Circuit defined "deliberate indifference" in a way that conflicts with *Farmer* and other circuits and applied the wrong standard to respondent's Rule 50 motion, he is mistaken.

On the latter point, the opinion explicitly and repeatedly acknowledged the well-settled principles that courts reviewing jury verdicts must view the evidence in the light most favorable to the non-movant, that both the objective and subjective elements of an Eighth Amendment claim are for the jury to decide in the first instance, and that appellate review is limited to the legal sufficiency of the evidence. Pet. App. 4, 7, 9, 12. Thus, petitioner is just plain wrong in arguing that the Seventh Circuit "evaluated and weighed the evidence on its own . . . ." Pet. 12. Indeed, under petitioner's view, every certiorari petition seeking review of a decision granting a Rule 50 motion should be granted. Here, the court merely did what every court does on appeal from a jury verdict (or summary judgment) – it determined the legal sufficiency of the evidence. The opinion creates no split among the circuits on this point.

The opinion also creates no split on how to prove "deliberate indifference." The court's holding that the Eighth Amendment does not require a guard to accept at face value a prisoner's claim of potential harm is fully consistent with decisions by other circuits and *Farmer*'s holding that a guard cannot be held liable for even an unsound belief that a risk is inconsequential. Moreover, contrary to petitioner's reading of the Seventh Circuit's opinion, it does not require statistical data to demonstrate deliberate indifference. Instead, it merely suggests that such evidence is another way to show both an objectively serious risk and a guard's actual knowledge of that risk, as *Farmer* itself suggested in the hypothetical. Lastly, no case stands for the proposition that a guard who was asked for protection against retaliation can be held liable for a non-retaliatory attack.

In sum, the petition fails to satisfy any of this Court's criteria for a grant of certiorari. It poses no important question of law, and it creates no circuit split. At bottom, petitioner merely contends that the Seventh Circuit misapplied settled law to the particular facts of this case. Certiorari should be denied.

ARGUMENT

I. The Seventh Circuit's Fact-Specific, Record-Bound Opinion Breaks No New Ground, and Creates No Inter-Circuit Conflict, Concerning the Evidence for Demonstrating Deliberate Indifference in Eighth Amendment Cases.

Citing three points from the Seventh Circuit's opinion, Petitioner asserts that this Court's review is needed due to "a conflict among the circuits and uncertainty as to what [evidence] is sufficient to meet both [the objective and subjective components of deliberate indifference] under *Farmer v. Brennan*." He is wrong on all counts.

A. The Seventh Circuit's Opinion Is Fully Consistent with *Farmer* and Creates No Cognizable Split on the Deliberate Indifference Standard.

Petitioner contends that the Seventh Circuit's opinion departs from *Farmer* and conflicts with other circuits' holdings about the evidence an inmate must present to establish the subjective component of an Eighth Amendment claim. Pet. 13-20. His argument, however, completely ignores *Farmer*'s hypothetical example of the evidence an inmate could present to demonstrate deliberate indifference, a hypothetical the Seventh Circuit's opinion reflects. Moreover, even a cursory look at the few cases he cites reveals that they do not conflict with the Seventh Circuit's opinion here.

In *Farmer*, this Court cautioned that the Eighth Amendment is not always implicated when one inmate injures another. 511 U.S. at 833. Instead, it warned, the Eighth Amendment comes into play only when a prison official "*gratuitously* allow[s] the beating or rape of one prisoner by another . . . ." *Id.* at 834 (emphasis added). Accordingly, a failure-to-protect claim succeeds only if supported by evidence of both a substantial risk of serious harm (the objective component) *and* the defendant prison official's "sufficiently culpable state of mind" (the subjective component), that is, "deliberate indifference" to that objective risk.[2] *Ibid.*

This Court then observed that the term "deliberate indifference" reflects a state of mind "more blameworthy than negligence" but "something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will

---

[2] Like one of the dissenters, petitioner mistakenly describes deliberate indifference, the subjective element of an Eighth Amendment claim, as having an objective component. *See* Pet. 14 (citing Pet. App. 27).

result." *Id.* at 835 (internal quotation marks omitted). Rejecting the objective test for recklessness used in civil cases, under which the risk of harm is either known or so obvious that it "should be known," this Court equated "deliberate indifference" with the familiar objective test used for criminal recklessness. *Id.* at 836-37. Accordingly, it held that a prison official may not be held liable absent evidence that he "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, *and* he must also draw the inference." *Id.* at 837 (emphasis added). This Court added that "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id.* at 838. Accordingly, this Court rejected the argument that a prison official could not be held liable if he was unaware of even an obvious risk, regardless of whether a "reasonable" prison official would have noticed the risk. *Id.* at 842. It also warned that a prison official could not be held liable even if the evidence showed that he knew the underlying facts indicating a sufficiently substantial danger, and thus was aware of a danger, but either "believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent" or responded reasonably to it. *Id.* at 844.

Noting that the prison official's state of mind is "a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence," this Court then offered a hypothetical example of the evidence a prisoner could present to demonstrate deliberate indifference. It explained that a trier of fact could find that a prison official had actual knowledge of a risk if the prisoner presented "evidence showing that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official

being sued had been exposed to information concerning the risk and thus 'must have known' about it . . . ." *Id.* at 842-43 (internal quotation marks omitted). It also held that "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious," though it cautioned that the obviousness of a risk is not conclusive evidence because "people are not always conscious of what reasonable people would be conscious of." *Id.* at 842-43 & n.8 (internal citation and quotation marks omitted). Lastly, this Court held, a prison official could be held liable if the evidence showed he "strongly suspected" a risk existed due to a "high probability of facts," but nevertheless refused to investigate it and thereby verify it. *Id.* at 843 n.8.

1. The Seventh Circuit's Opinion Is Fully Consistent with Other Circuits' Views That a Prisoner's Report of Potential Harm, Standing Alone, Is Insufficient to Impute Actual Knowledge of a Substantial Risk of Serious Harm in Every Case.

Petitioner first contends that the Seventh Circuit's holding that "a prisoner's bare assertion [of potential harm] is not enough to make the guard subjectively aware of a risk" conflicts with rulings by "other Circuits." Pet. 10, 15-16, 20-21. As support, however, he cites just one case, in which the Sixth Circuit upheld the denial of qualified immunity for defendant prison officials on the plaintiff's claim that his son had been murdered by another inmate due to their deliberate indifference. *Id.* at 15-16 (citing *Flint v. Kentucky Dep't of Corrections*, 270 F.3d 340 (6th Cir. 2001)). In *Flint*, however, the Sixth Circuit's painstaking review of the evidence revealed that the record included much, much more than the son's "bare assertion" of potential harm.

Specifically, the plaintiff in *Flint* presented evidence that (1) one month prior to the murder, an investigation into a

disciplinary charge against the deceased inmate revealed that a prison official had filed the charge in retaliation after the deceased reported that the official, the killer, and two other inmates had broken prison rules; (2) as a result, the three rule-breaking inmates lost desirable prison jobs and were banned from the work area; (3) two weeks before the murder, the killer was sent a letter by one of the other rule-breakers, describing the deceased as "at the top of [his] list of things to do"; (4) a week before the murder, the killer was sent another letter by the same rule-breaker, reiterating that he blamed the deceased and adding "I want to kill [the deceased] so bad, I dream about it"; (5) less than a week before the murder, the deceased told the plaintiff he was going to be killed during a telephone call and the plaintiff relayed this to some of the defendants as well as to a state representative, who in turn called another defendant; and (6) the defendants who allowed the killer unsupervised access to the room where he killed the deceased had been informed of the killer's death threat against the deceased. *Id.* at 344-45. The court then held that the deceased's report of rule-breaking by the killer and others, coupled with the falsified disciplinary report and the threatening letters, were sufficient to prove deliberate indifference. *Id.* at 354. Plainly, *Flint* cannot be deemed to conflict with the Seventh Circuit's reasoning here, for the record there (unlike here) contained a plethora of evidence to bolster to the deceased's report of potential harm.

Worse yet, petitioner fails to mention that his argument (*i.e.*, actual knowledge of a substantial risk of serious harm *must* be imputed to a guard who hears an inmate's report of potential harm, no matter how baseless) conflicts with the view of at least two federal reviewing courts, who have stated that "'threats between inmates are common and do not, under all circumstances, serve to impute actual knowledge of a substantial risk of harm.'" *Jackson v. Everett*, 140 F.3d 1149, 1152 (8th Cir. 1998) (quoting *Prater v. Dahm*, 89 F.3d 538, 541 (8th Cir. 1996)); *see also Varmado-El v. Martin*, 2002 WL

31780947 at *2 (6th Cir. 2002) (unpublished opinion). He also fails to appreciate that his view of deliberate indifference is squarely at odds with *Farmer*: he wants to impose strict liability on any guard who hears any inmate report of potential harm, even if undisputed evidence shows that there was no objective risk or that the guard subjectively believed the risk was insubstantial or nonexistent.

In short, petitioner's argument, if adopted, would eviscerate *Farmer*'s objective and subjective components for an Eighth Amendment claim. Under his rule, no matter how objectively baseless a reported threat might be, a prison official *must* believe and honor it, or he will be deemed deliberately indifferent. Petitioner offers no support for his tacit view that the Eighth Amendment requires all guards to believe all inmates all the time. As the Seventh Circuit correctly held, it does not. There is no circuit split on this point.

2. The Seventh Circuit's Opinion Concerning Whether Statistical Data Are Required to Demonstrate a Defendant's Subjective Knowledge of an Objective, Substantial Risk of Serious Harm Is Fully Consistent With *Farmer* and Other Circuits' Rulings.

Petitioner next implies that the Seventh Circuit *requires* statistical data to prove deliberate indifference, and he argues that this requirement conflicts with *Farmer* and decisions by other circuits that statistics are irrelevant and that circumstantial evidence can be used to prove actual knowledge. Pet. 10-11, 16-18, 20. The Seventh Circuit, however, imposes no such requirement, as evidenced by its recent opinions in *Pierson v. Hartley*, 391 F.3d 898 (7th Cir. 2004) (reversing summary judgment against inmate plaintiff because jury could conclude that defendant was deliberately indifferent based on evidence that defendant assigned attacker with history of violence to unrestricted quarters and then kept him there several months

despite discipline for possessing weapon), and *Velez v. Johnson*, No. 04-1943 (7th Cir. Jan. 13, 2005) (affirming denial of qualified immunity at summary judgment because jury could conclude that defendant was deliberately indifferent based on evidence that after telling defendant he was having conflict with cellmate, plaintiff had pushed emergency call button, which he had no history of abusing, and defendant had been instructed to respond personally to emergencies).

A proper reading of the Seventh Circuit's opinion reveals that the court merely suggested that statistical data are *one* way, not the *only* way, to prove a defendant's actual knowledge (as well as the objective risk) of harm when the attacker had no history of violence. Pet. App. 10. Petitioner overlooks the similarity between the Seventh Circuit's suggestion and this Court's hypothetical in *Farmer* about how circumstantial evidence can demonstrate that a defendant "must have known" of a risk of harm, *i.e.*, by showing that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past (*and* that the defendant had been exposed to this information). 511 U.S. at 842-43. Thus, the Seventh Circuit's suggestion about using statistical data to demonstrate deliberate indifference comports, not conflicts, with *Farmer*.

Petitioner's three "conflicting" cases demonstrate no inter-circuit conflict. For example, he cites *Smith v. Brenoettsy*, 158 F.3d 908 (5th Cir. 1998), for the proposition that statistics are irrelevant to the deliberate indifference inquiry. Pet. 18. In fact, *Smith* indicates that statistical data *are* relevant, holding that "the number of prisoner complaints [about a subordinate officer] *would appear to cut both ways in determining the reasonableness of a prison official's response*." 158 F.3d at 912 (emphasis added) (rejecting defendant supervising officer's argument that the high number of prisoner complaints alone

made his failure to investigate a reasonable response to plaintiff's complaint about the subordinate).

In *Hamilton v. Leavy*, 117 F.3d 742 (3d Cir. 1997), the court reversed the entry of summary judgment for the defendant prison officials based on evidence that (1) it was undisputed that the plaintiff's safety "ha[d] been an ongoing concern" from 1976 through 1992, based in part on his cooperation with an investigation into drug trafficking by inmates and officials and his resultant reputation as a "snitch"; (2) a unanimous recommendation that the plaintiff be placed in protective custody, which one defendant rejected despite having placed the plaintiff in protective custody on two prior occasions; and (3) the same defendant's knowledge of the plaintiff's cooperation and his later being labeled a "snitch. *Id.* at 744-47. Significantly, the *Hamilton* court characterized the circumstantial evidence before it as "essentially identical to [that] hypothesized by the *Farmer* Court . . . ." *Id.* at 748. Here, of course, petitioner's evidence was not "essentially identical" to the evidence hypothesized in *Farmer*. On the contrary, it was this very defect that the Seventh Circuit found fatal to his case.

Petitioner's citation to *Spruce v. Sargent*, 149 F.3d 783 (8th Cir. 1998), is a curious choice. There, the court *affirmed* judgment as a matter of law for one defendant because (as here) the plaintiff had failed to present sufficient evidence from which a jury could find that she had subjective knowledge of a risk that the plaintiff would be sexually assaulted. *Id.* at 786. The court also held that if a plaintiff presents circumstantial evidence of "very obvious and blatant circumstances indicating that the defendant knew the risk existed," a jury may infer that a defendant "must have known" of the risk. *Ibid.* (internal quotation marks omitted). There, the plaintiff presented both the other defendant's testimony that he knew about that risk of sexual assault in the place at issue and "numerous documents

from the relevant time period containing references to the sexual attacks he was suffering," many of which bore that defendant's signature. *Ibid.* Here, petitioner presented no evidence of "very obvious and blatant circumstances indicating that [respondent] knew the risk existed." Instead, his only bit of evidence was his own alarum to respondent and his subsequent denial of any problem. *Spruce* is obviously inapposite here.

In sum, as demonstrated by its subsequent opinions in *Velez* and *Pierson*, the Seventh Circuit created no new rule requiring statistical evidence to prove deliberate indifference, and its decision created no inter-circuit conflict.

3. The Seventh Circuit's Opinion Concerning Whether the Harm That Occurs Must Be Related to the Potential Harm a Prisoner Asserted Is Fully Consistent With *Farmer* and Other Circuits' Decisions.

Petitioner next contends that the Seventh Circuit held that an inmate must complain about the specific harm that occurred to show deliberate indifference, arguing that this ruling conflicts with several circuit court rulings. Pet. 18-20.

Petitioner completely misinterprets the Seventh Circuit's opinion. As an initial matter, the court was addressing the legal sufficiency of the evidence for the (objective) risk of harm from celling Garcia with petitioner, not the evidence about respondent's (subjective) deliberate indifference. Pet. App. 8. In addition, contrary to petitioner's view (Pet. 18), the court did *not* hold that he failed to show deliberate indifference just because he was sexually assaulted rather than killed. Instead, the court held that Petitioner failed to establish deliberate indifference because he failed to show any connection between the risk of harm he told respondent he feared (a Latin King retaliatory "hit," however effected) and the harm that occurred

(Garcia's sexual assault to fulfill a personal fantasy). As the Seventh Circuit correctly concluded, on this record, Petitioner failed to show that the (objective) risk of placing Garcia in petitioner's cell was any greater than the risk of placing any prisoner there. Pet. App. 8. This view comports with well-established precedent that the Eighth Amendment concerns punishment. *See, e.g., Langston v. Peters*, 100 F.3d 1235, 1238-39 (7th Cir. 1996) (upholding summary judgment against inmate who claimed that defendants were deliberately indifferent to risk of retaliation but failed to provide any evidence that attack was retaliatory). Under petitioner's view, an inmate who tells a guard that he fears his arsonist cellmate will set fire to the cell can succeed on an Eighth Amendment claim even if the arsonist stabs him. Petitioner offers no authority, though, for this novel notion.

None of the three authorities petitioner cites as support on this point conflicts with the Seventh Circuit's reasoning here. For example, he again cites *Smith*, in which the defendant supervisor argued that the plaintiff inmate's letters to him complaining about a guard's verbal abuse were insufficient to make him actually aware that the guard would stab the plaintiff. Pet. 19. Petitioner neglects to mention, however, that the *Smith* court explicitly declined to rule on the sufficiency of this evidence due to lack of jurisdiction. 158 F.3d at 912. *Calderon-Ortiz v. Laboy-Alvarado*, 300 F.3d 60 (1st Cir. 2002), is inapt in a different way. It applied the more lenient requirements for *pleading* an Eighth Amendment claim, such as that a plaintiff may generally aver knowledge, so it deemed legally sufficient the plaintiffs' allegations that the defendants were aware of the prison's inadequate regard for inmates' security needs. *Id.* at 65. Indeed, the First Circuit distinguished *Calderon-Ortiz* on this ground when it upheld the entry of summary judgment for prison officials because the plaintiff had failed to provide evidence of deliberate indifference. *See Burrell v. Hampshire County*, 307 F.3d 1, 9 (1st Cir. 2002).

As for *Curry v. Scott*, 249 F.3d 493 (6th Cir. 2001), the court merely held that summary judgment was inappropriate given that the plaintiffs had presented (1) the attacking guard's employment record, which contained "a great deal of evidence" concerning his racial discrimination and his propensity to injure inmates by use of force; (2) an internal memorandum to one defendant suggesting that the guard be disciplined before someone was hurt; and (3) sworn statements by the guard's co-workers and supervisors about his conduct and attitude. *Id.* at 508. Not one of these cases turned on whether a defendant prison official knew a particular inmate would be harmed in a certain way, and all of them presented far more evidence of deliberate indifference than is contained in the record here.

In sum, contrary to petitioner's arguments, other circuits have *not* held that an inmate's bare assertion of potential harm is enough to establish deliberate indifference, the Seventh Circuit did *not* create "a new and unprecedented requirement" for statistical data to prove deliberate indifference, and the Seventh Circuit did *not* hold that an inmate must complain about the specific harm that occurred to establish deliberate indifference. Instead, the Seventh Circuit's ruling is a straightforward application of *Farmer* and its progeny to the meager evidence in the record. This Court's review of that ruling is not warranted.

B. The Seventh Circuit's Opinion Is Fully Consistent With This Court's Rule 50 Jurisprudence.

The Seventh Circuit explicitly acknowledged that the subjective and objective components of Eighth Amendment claims are factual questions, and that its review was limited to whether a reasonable jury could have found that respondent actually knew that celling Garcia with petitioner posed a substantial risk of serious harm. Pet. App. 4, 7. Petitioner insists that instead of applying this test and deferring to the jury's factfinding, the court impermissibly reweighed the

evidence. Pet. 20-23. Petitioner fails to appreciate, however, that the legal question presented by respondent's Rule 50 motion was whether petitioner had presented enough evidence to get his case to the jury in the first place. Fed. R. Civ. P. 50. To answer this question, the court had to determine whether the evidence created factual disputes or credibility determinations requiring resolution by a jury as a matter of law. The answer, as the Seventh Circuit correctly held, was no. On this record, a reasonable jury could not find either that an objective risk of harm existed or that respondent subjectively appreciated any such risk of harm.

Contrary to petitioner's implication that the role of a reviewing court when reviewing the denial of a Rule 50 motion is uncertain (Pet. 20-23), this Court explained not long ago that the applicable standard is the same as that for a summary judgment motion. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). This is the very same standard that courts all across the country apply every day, whether on summary judgment, at the close of the evidence before a case goes to the jury, or after a verdict. Ironically, one of petitioner's own authorities demonstrates the fact-intensive nature of this inquiry, which can be decided only case by case, sometimes even defendant by defendant. In *Woods v. Lecureux*, 110 F.3d 1215 (6th Cir. 1997), the court upheld the grant of a Rule 50 motion for one defendant prison official because the plaintiff inmate failed to show that this defendant was deliberately indifferent, but it reversed the grant of the motion as to another defendant because the plaintiff met his evidentiary burden as to that defendant.

Moreover, all but one of petitioner's other case law support on this point pre-dates *Reeves*, and some even pre-date *Farmer*. Thus, their continued vitality is questionable. Moreover, though petitioner expresses concern about the application of Rule 50 to deliberate indifference questions, one authority is not

an Eighth Amendment case. None of these cases is helpful anyway, for not one of them conflicts with the standard articulated (and applied) by the Seventh Circuit here.

In *Symons v. Mueller Co.*, 493 F.2d 972 (10th Cir. 1972), a gas explosion case, the court expressed the test as one in which "evidence and all the inferences to be drawn therefrom are so patent that minds of reasonable men could not differ from the conclusions to be drawn therefrom. . . . [A] directed verdict or judgment n.o.v. may not be granted unless the evidence points one way ans is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made." *Id.* at 976. In *Stubbs v. Dudley*, 849 F.2d 83 (2d Cir. 1988), the court acknowledged differently articulated versions of the Rule 50 standard without finding any conflict among them, and it held that a motion may be granted "if, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached." *Id.* at 85 (internal quotation marks omitted).

Petitioner also asserts that "many other Circuits . . . have stressed the need for great deference to the jury's fact-finding" on the issue of deliberate indifference, implying that a different, and stricter, standard of review should apply after a case goes to the jury. Pet. 23 (citing *Giroux v. Somerset County*, 178 F.3d 28, 34 (1st Cir. 1999) (vacating summary judgment for defendant guard because inmate plaintiff presented evidence that created question of fact as to defendant's deliberate indifference); *Hayes v. New York City Dep't of Corrections*, 84 F.3d 614, 621 (2d Cir. 1996) (holding that the evidence before it created a question of fact for trial concerning the reasonableness of measures defendants took to protect plaintiff from second attack); and *Curry*, 249 F.3d at 508 (holding that summary judgment was inappropriate because plaintiff created question of fact as to supervising defendants' deliberate

indifference with evidence of "vast *number* of complaints and grievances" against attacking guard, which showed a pattern of racial harassment) (emphasis in original)). Not one of these cases stands for the proposition that courts must give "great deference" to the facts a jury has found. Instead, each case merely held that the evidence before it was legally sufficient and thus permitted the case to continue to a trial, at which the jury would engage in fact-finding. Petitioner also fails to appreciate that, as *Reeves* explained, the question a court decides after a jury has reached its verdict is the very same question it must decide at the close of the evidence, before the case is given to the jury for factfinding, as well as on summary judgment: whether the case *should* go to a jury. Likewise, though he questions the role of a reviewing court (Pet. 20, 23), he fails to appreciate that under the *de novo* standard applicable to this question of law, a reviewing court's role is the same as that of the district court.

In short, none of the cases petitioner cites demonstrates an inter-circuit conflict about the role of the reviewing court when reviewing a Rule 50 ruling after a jury verdict. Instead, these cases are in harmony with the standard the Seventh Circuit both articulated and applied in this case.

II. Even If This Court Ruled in Petitioner's Favor on Both Questions Presented in the Petition, the Final Outcome of This Case Would Be No Different.

To grant a petition for a writ of certiorari would be pointless when the judgment will not be affected by a ruling in favor of the petitioner on the questions a petition presents. That is what will happen here, for petitioner cannot overcome two other barriers to the entry of judgment in his favor: the PLRA's requisite for filing suit, and respondent's entitlement to qualified immunity.

Though the Seventh Circuit affirmed the denial of respondent's motion to dismiss for failure to exhaust administrative remedies under the PLRA (Pet. App. 2-4), this case should have been dismissed at the outset. When respondent moved for dismissal for failure to comply with the PLRA's exhaustion requirement (Doc. 7), petitioner responded with a copy of his February 1998 grievance (Doc. 18 at Ex. 2), and the district court denied the motion (Doc. 25 at 2). The Seventh Circuit affirmed, on the ground that the grievance was sufficient to alert prison officials to the nature of the harm for which petitioner filed his suit (Pet. App. 2-4), but a quick review of the grievance itself, along with testimony by petitioner that the Seventh Circuit did not mention, shows otherwise.

The February 1998 grievance gives no indication that it concerned respondent's decision to place Garcia in petitioner's cell. Petitioner did not check off "Staff Conduct" as the subject matter; instead, he checked the box marked "Other." Doc. 18 at Ex. 2. In fact, petitioner himself candidly conceded at trial that the grievance had nothing to do with respondent putting Garcia in his cell and that its sole purpose was to persuade prison officials to have criminal charges brought against Garcia. Tr. III. 65-66. These concessions were fatal to petitioner's case under the PLRA, for his grievance did not (and was not intended to) alert prison officials to the nature of the wrong (petitioner's celling decision) for which petitioner later filed suit. *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002). Because petitioner did not comply with the PLRA's precondition for suit, his suit had to be dismissed. *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002) (citing *Booth v. Churner*, 532 U.S. 731, 739 (2001)).

Another ground on which the judgment would be affirmed is qualified immunity, an issue the Seventh Circuit did not reach, though it criticized the district court's reasoning when

denying respondent's motion to dismiss on this ground. Pet. App. 7. Qualified immunity shields from suit those who make a decision that, though unconstitutional, "reasonably misapprehends the law governing the circumstances they confronted," which in turn is "judged against the backdrop of the law at the time of the conduct" and "in light of the specific context of the case" rather than as a broad general proposition" or "at a high level of generality." *Brosseau v. Haugen*, 125 S. Ct. 596, 599-600 (2004) (internal quotation marks omitted).

Here, petitioner presented no cases relevant to the situation respondent confronted: whether to accept at face value petitioner's bare assertion that Garcia posed a risk of a retaliatory Latin King "hit" when Garcia too had sought protection from the Latin Kings and had no known record of violence. Moreover, authority to the contrary was issued *after* Garcia's attack. *See, e.g., Luttrell v. Mickel*, 129 F.3d 933 (7th Cir. 1997) (affirming summary judgment against plaintiff inmate who was injured nine days after his request to replace cellmate who heard voices telling him to kill someone); *Jackson v. Everett*, 140 F.3d 1149 (8th Cir. 1998) (rejecting notion that prison official violated Eighth Amendment by doing nothing after questioning threatened inmate in other inmate's presence and being told there was no problem); *Blades v. Schuetzle*, 302 F.3d 801 (8th Cir. 2002) (affirming summary judgment against inmate who had told official he did not fear (and needed no protection from) inmate who later injured him). Were there any doubt that the law is not "clearly established" even today, the dispute among the Seventh Circuit's judges on denial of rehearing en banc in the instant case would dispel them.

CONCLUSION

The petition for a writ of certiorari should be denied.

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In The Supreme Court of the United States

ANTHONY RICCARDO,

Petitioner,

v.

LARRY RAUSCH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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INTRODUCTION

Respondent Rausch obscures the important legal questions presented by this case which are dividing the Circuits and which constantly recur in prisoner litigation: How is it determined whether a prison official has sufficient knowledge of a threat to establish "deliberate indifference" under *Farmer v. Brennan*, 511 U.S. 825 (1994)? When is it appropriate for a court of appeals to overturn a jury's verdict that an officer was deliberately indifferent in failing to respond adequately to a serious threat to an inmate's safety?

Since *Farmer v. Brennan* prescribed the "deliberate indifference" standard for Eighth Amendment claims by prisoners, the Circuits have taken varying approaches to these questions and this Court has not returned to the issue. As Judge Williams explained in her dissent to the denial of *en banc* review: "With regard to the Eighth Amendment inquiry, the majority opinion highlights a major gap in the caselaw. Particularly, what is required to prove the objective prong of the deliberate indifference standard?" Appendix to Petition for Writ of Certiorari (hereafter "App.") at 27.

Contrary to Respondent Rausch's assertion, the Seventh Circuit took an approach to these questions which is at odds with other Circuits. In overturning the jury's verdict, Judge Easterbrook's opinion for the court emphasized the absence of statistical evidence proving the reliability of prisoner complaints and the difference between the harm feared (death) and the harm suffered (sexual assault and physical battery). As Judge Ripple explained in a dissent from the denial of *en banc* review joined by three other judges: "Neither of these requirements find support in circuit or Supreme Court precedent." App.

at 22. The Seventh Circuit's approach is a dramatic change in the law, and as Judge Ripple explained: "Requiring the sort of statistical evidence suggested by the panel majority in order to establish the existence of such a risk imposes on inmates a practical burden that is impossible for prisoners to meet." App. at 25.

Respondent Rausch also raises two other grounds for denying review that were not relied on by the Court of Appeals. Neither has merit. First, Rausch argues that there was not proper exhaustion under the Prison Litigation Reform Act, 42 U.S.C. §1997e(a). But as the Seventh Circuit concluded, Riccardo filed a grievance which complained of his being sexually assaulted and beaten and the State of Illinois "accepted and denied the grievance on the merits." App. at 2. Rausch objects to the lack of detail in the grievance, but as the Seventh Circuit noted "this grievance *did* complain that Garcia had committed a rape and that 'the administration don't do there [sic] job.'" App. at 3 (emphasis in original). Thus, the court properly concluded that the exhaustion requirement was met: "If Illinois wants grievances to be more detailed, it must adopt regulations and inform prisoners what is required of them. Riccardo is entitled to a decision on the merits of his constitutional claim." App. at 4.

Second, Rausch argues that qualified immunity bars recovery. But the law is clearly established under *Farmer v. Brennan* that deliberate indifference by prison guards violates the Eighth Amendment. As Judge Williams explained in discussing why Rausch should not be accorded qualified immunity: "It is clear that *Farmer* put prison guards on notice that they have a duty, under the Eighth Amendment, to protect inmates from being gratuitously beaten or raped by other inmates." App. at 21 (Williams, J., dissenting on other grounds).

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND TO CLARIFY AN IMPORTANT ISSUE OF LAW CONCERNING WHAT IS SUFFICIENT TO DEMONSTRATE THAT A PRISON GUARD HAD SUFFICIENT KNOWLEDGE TO BE "DELIBERATELY INDIFFERENT" TO THE RISK OF VIOLENCE.

Rausch argues against review by mischaracterizing the basis for Riccardo's claim of deliberate indifference, the evidence that was before the jury, and the issues presented in this case. Rausch incorrectly asserts that "[Riccardo] wants to impose strict liability on any guard who fears any inmate report of potential harm, even if undisputed evidence shows that there was no objective risk or that the guard subjectively believed that the risk was insubstantial or non-existent." (Brief in Opposition at 16.) Quite the contrary, that is not Riccardo's position and in this case there was much more than that to support the jury's conclusion of deliberate indifference.

When Rausch told Riccardo that he was going to be housed with Garcia, Riccardo immediately objected and informed Rausch that Garcia was a member of the Latin Kings prison gang; that the Latin Kings had "a hit" on Riccardo; that Riccardo feared that his life would be in danger by being placed in a cell with Garcia; and that afternoon another prison guard, Lt. Alemond, chose not to put Garcia and Riccardo together based on this information. (Tr. I, p. 75). This threat was particularly credible because Riccardo was being housed in the receiving unit precisely because of his fear of retaliation by the Latin Kings over a complaint he had filed against one of their members for stealing property from his cell. (Tr. I, pp. 67-68). None of these facts are in dispute.

Moreover, the jury heard *Rausch* testify: "If [Riccardo] would have told me that he feared for his life, if he refused housing or thought that there was a threat to his safety[,] he would not have been placed – they would not have been placed together." (Tr. III, at 73). But what did Rausch do? First, he falsely told Riccardo he had no choice but to accept Garcia as a cellmate (Tr. II, pp. 30-31), even though Illinois prison policy clearly requires that inmates not be celled together if one expresses a fear for safety until the concern can be investigated. (Tr. III, pp. 69-70). Second, Rausch called Riccardo and Garcia together and asked them in front of each other whether they had any problem being celled together. (Tr. I, p. 75). As the district court explained in upholding the jury's verdict: "A jury could have reasonably inferred that Rausch crossed the line from gross negligence to deliberate indifference based on the ludicrousness of 'asking' each inmate if he had a problem in front of the other." App. at 26.

Thus, this case hardly fits Respondent Rausch's characterization of it being a "prisoner's report of potential harm standing alone." (Brief in Opposition at 14.) Indeed, the Seventh Circuit's rejection of this evidence as sufficient evidence to support the jury's verdict of deliberate indifference directly conflicts with the Sixth Circuit's conclusion in *Flint v. Kentucky Dep't of Corrections*, 270 F.3d 340 (6th Cir. 2001), where the failure to respond to a prisoner's complaint was deemed adequate to establish deliberate indifference. Rausch attempts to distinguish this case by claiming that it involved a "plethora of evidence" to bolster the inmate's claim. (Brief in Opposition at 15.) But both cases involved many facts to support the prisoners' concerns; the difference is that the Circuits took very different approaches to defining what is sufficient to establish deliberate indifference.

Moreover, the specific reasons offered by the Seventh Circuit for overturning the jury's verdict conflict with the decisions of other Circuits and necessitates clarification by this Court as to what is sufficient to meet the "deliberate indifference" standard. First, the Seventh Circuit emphasized the lack of statistical evidence in the record concerning the number of murders and sexual assaults at the prison; how many were preceded by requests for protection; how many requests for protection were dishonored, but nothing happened. App. at 10. Rausch attempts to minimize the importance of this aspect of the Seventh Circuit's opinion by stating that the court "merely suggested that statistical data are one way" of proving the objective risk of harm. (Brief in Opposition at 17.) But the Seventh Circuit gave more emphasis than this to the lack of statistical evidence. Judge Easterbrook, writing for the court, declared: "But if violence is rare, or if there is poor correlation between inmates' alarms and subsequent violence, then Riccardo's initial protest would not have provided Rausch with actual knowledge of an impending assault." App. at 10.

As Judge Ripple noted in his dissent from the denial of *en banc* review, this "imposes a new and impossibly high standard of proof for establishing deliberate indifference to prison condition cases." App. at 22. Rausch attempts to distinguish the cases cited by Riccardo which conflict with the Seventh Circuit's decision. *Smith v. Brenoettsy,* 158 F.3d 908 (5th Cir. 1998); *Hamilton v. Leavy*, 117 F.3d 742 (3d Cir. 1997); *Spruce v. Sargent*, 149 F.3d 783 (8th Cir. 1998). But the factual distinctions among the cases should not obscure the basic point that these courts, unlike the Seventh Circuit, said that circumstantial evidence is sufficient to establish deliberate indifference and that statistical evidence is not needed.

Second, the Seventh Circuit stressed that there was not deliberate indifference because the harm Riccardo complained of, his death, was different from the harms he suffered, rape and physical assault. App. at 8. Rausch states: "Petitioner failed to establish deliberate indifference because he failed to show any connection between the risk of harm he told respondent he feared (a Latin King retaliatory 'hit,' however effected) and the harm that occurred (Garcia's sexual assault to fulfill a personal fantasy." (Brief in Opposition, at 20.)

But this misses the point: Riccardo feared physical violence if he was housed with Garcia and expressed this fear to Rausch. Rausch ignored this fear and after placing Riccardo in a cell with Garcia, Riccardo was subjected to physical violence: sexual assault and physical battery.

Again, Rausch points to factual differences between this case and those cited by Riccardo, but none of these distinctions alter the basic point: unlike the Seventh Circuit, several other Circuits have explicitly ruled that a prisoner need not complain of the specific harm suffered in order to show deliberate indifference. *See, e.g., Curry v. Scott,* 249 F.3d 493, 507 (6th Cir. 2001) ("actual knowledge does not require that a prison official know . . . that a particular prisoner would be harmed in a certain way"); *see also Smith v. Brenoettsy*, 158 F.3d at 912 ("we have never held that a supervisory official be warned of the precise act that the subordinate official subsequently commits"); *Calderon-Ortiz v. Laboy-Alvarado*, 300 F.3d 60, 64 (1st Cir. 2002) (a prisoner need not have complained of the specific harm that occurred.)

Simply put, there is significant confusion and conflict among the Circuits as to what is sufficient to establish "deliberate indifference" under *Farmer v. Brennan*. This

Court should grant review to clarify the law and resolve the conflict among the Circuits.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND TO CLARIFY AN IMPORTANT ISSUE OF LAW CONCERNING WHEN IT IS APPROPRIATE FOR A COURT OF APPEALS TO OVERTURN A JURY'S VERDICT THAT A PRISON GUARD WAS SUBJECTIVELY INDIFFERENT TO A PRISONER'S SAFETY AND THUS IS LIABLE FOR THE INJURIES SUFFERED.

The jury in this case found that Rausch was deliberately indifferent and ruled in favor of Riccardo. Rausch then made a motion, pursuant to Rule 50 of the Federal Rules of Civil Procedure for a judgment as a matter of law, based on the insufficiency of the evidence to support the jury's verdict. The district court carefully reviewed all of the evidence, stressed that the credibility of witnesses was crucial, and opined: "[T]here is ample evidence from which to conclude that Rausch's attempt to ascertain the seriousness of the threat was merely pretense, and that because he did not want to go to the extra effort to find different accommodations for Garcia, he recklessly disregarded a dangerous situation. That decision to essentially disregard the threat is where liability lies." App. at 46. The Seventh Circuit, however, overruled the district court and held that "no reasonable jury" could have found deliberate indifference. App. at 9.

Rausch argues that the Seventh Circuit applied well-settled law concerning the standard for overturning jury verdicts under Rule 50. (Brief in Opposition at 24-26.) This, however, ignores that the Seventh Circuit could come to its conclusion only by reweighing the evidence and

making its own evaluation of the credibility of witnesses. As Judge Ripple explained in his dissent from the denial of *en banc* review: "[T]he panel majority ... effectively amends, without any legislative mandate, the standard for judgment as a matter of law under Federal Rule of Civil Procedure 50 for cases brought by prisoners." App. at 22.

The key question dividing the Circuits, and which requires resolution by this Court, is when is it appropriate for a court of appeals to overturn a jury's finding of subjective deliberate indifference in prison cases. Other Circuits have stressed that whether a prison guard is subjectively indifferent is a question for the jury and evidence is not to be reweighed by judges. *See, e.g., Woods v. Lacureux,* 110 F.3d 1215 (6th Cir. 1997); *Giroux v. Somerset County*, 178 F.3d 28, 34 (1st Cir. 1999); *Hayes v. New York City Department of Corrections*, 84 F.3d 614, 621 (2d Cir. 1996).

P[illegible]ttempts to distinguish these cases by arguing that "[illegible] case merely held that the evidence before it was legally sufficient and thus permitted the case to continue to a trial." (Brief in Opposition at 24.) But Rausch misses the point that these cases allowed the matter to be resolved by the jury because of their conclusion that it was for the jury to weigh conflicting evidence, evaluate credibility, and determine whether there was subjective indifference. The Seventh Circuit opinion is in conflict with the other courts because of its very different approach to Rule 50 and its view as to when it is appropriate for a court of appeals to overturn a jury's verdict of deliberate indifference. This Court should grant review to resolve this conflict among the Circuits that constantly arises in appellate review of jury verdicts in prison cases.

III. NEITHER THE PRISON LITIGATION REFORM ACT NOR QUALIFIED IMMUNITY SUPPORT THE SEVENTH CIRCUIT'S DECISION OR PROVIDE A BASIS FOR THIS COURT TO DENY REVIEW.

Rausch raises two additional grounds to support the Seventh Circuit's decision. First, he argues that Riccardo's claim is barred for failure to exhaust administrative remedies as required by the Prison Litigation Reform Act. However, the Seventh Circuit expressly considered this and unanimously concluded, as did the district court, that the exhaustion requirement had been met because Riccardo filed an administrative grievance; that the grievance specifically stated that he had been sexually assaulted; and that the grievance requested action from the prison system. App. at 2-3, 12.

Rausch argues that Riccardo's grievance, which complained of the sexual assault, was not sufficiently specific in complaining about Rausch's conduct or the relief sought. Because §1997e(a) does not provide any rules for prisoners to follow regarding the specificity of grievances, the procedures are determined by the state's grievance procedure. *Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002). In *Strong*, the court concluded that Illinois law requires only that the grievance "[alert] the prison to the nature of the wrong for which redress is sought." *Id.* Riccardo's grievance obviously did this as it described the assault and trauma that he suffered as a result of being celled with Garcia.

Rausch claims that this is insufficient because Riccardo only was seeking criminal prosecution of Garcia. (Brief in Opposition at 25.) To the contrary, Riccardo's grievance expressly blamed "the administration" of the prison and asked for relief from the prison system. As the Seventh Circuit concluded, this is sufficient for exhaustion:

Riccardo complained of the specific harm he suffered, sexual and physical assault, and asked for relief. App. at 4.

Second, Rausch claims that his actions are protected by qualified immunity. But there is no doubt that as of 1997, when the events giving rise to this lawsuit occurred, it was clearly established that "deliberate indifference" to a prisoner's safety violated the inmate's Eighth Amendment rights. *Farmer v. Brennan*, decided by this Court three years earlier, unequivocally held that deliberate indifference in failing to protect a prisoner from a sexual assault violates the Eighth Amendment. As Judge Williams explained, qualified immunity is unavailable to Rausch because *Farmer v. Brennan* put prison guards on clear notice that they have a duty to protect other inmates from being raped or beaten by other inmates. App. at 21 (Williams, J., dissenting on other grounds).

CONCLUSION

This case presents important questions of law that constantly recur in prison litigation and that have divided the Circuits. This Court should grant review to resolve this conflict and to clarify the law concerning "deliberate indifference" which affects millions of prisons across the country every day.

Respectfully submitted,

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